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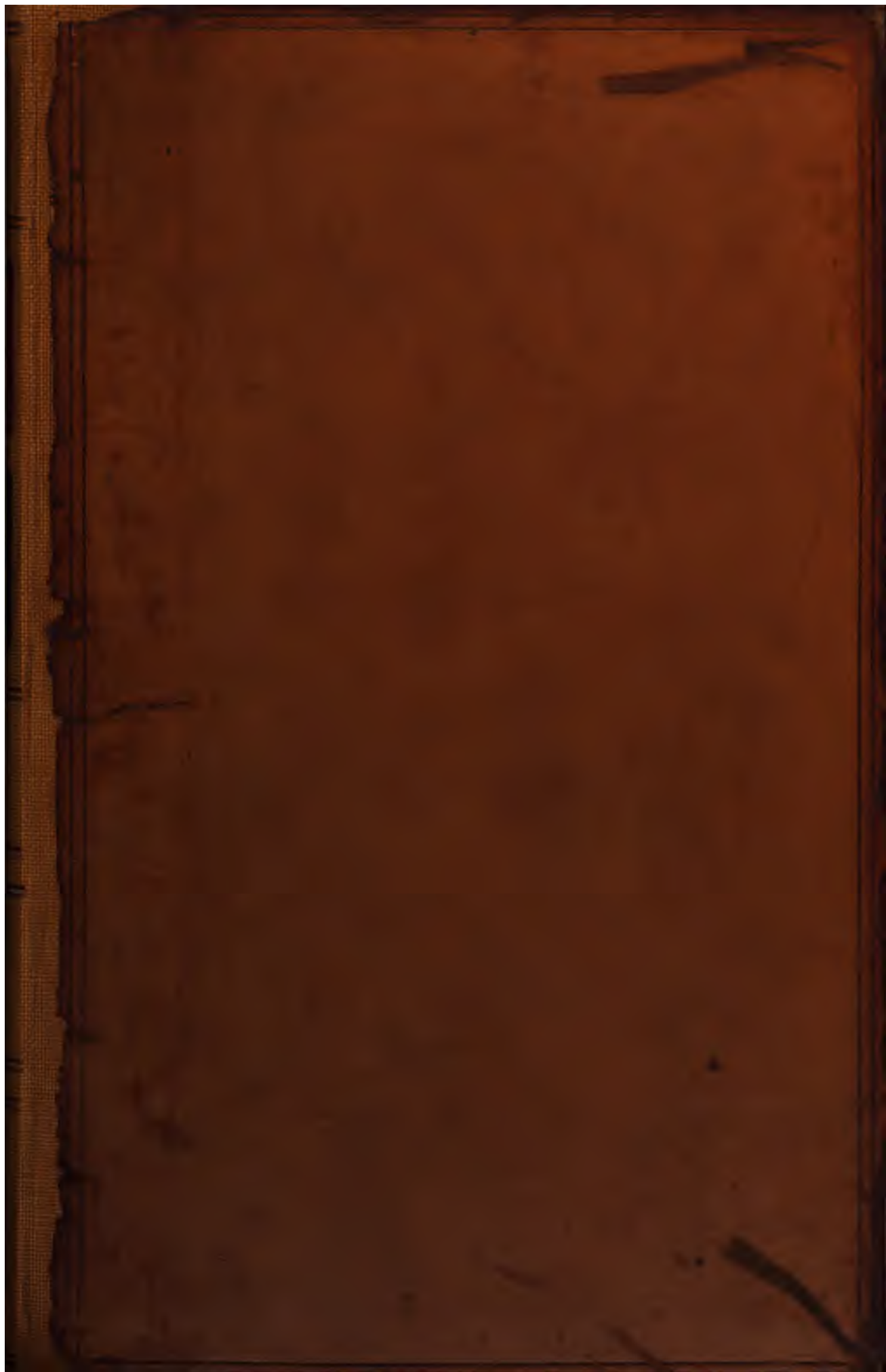
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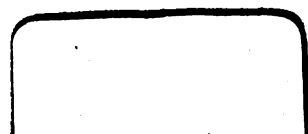
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IRISH LAW REPORTS,

PARTICULARLY OF

POINTS OF PRACTICE,

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

AND

EXCHEQUER OF PLEAS,

From Michaelmas 1839, to Trinity 1840, inclusive,

In the Third and Fourth Years of the Reign of Queen Victoria.

Queen's Bench:

By FRANCIS BRADY, Esq.

Common Pleas:

By JOHN ADAIR, Esq.

Exchequer of Pleas:

By ROSS S. MOORE, Esq.

BARRISTERS-AT-LAW.

VOL. II.

DUBLIN:

HODGES AND SMITH, 21, COLLEGE GREEN.

1840.

JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

COURT OF QUEEN'S BENCH.

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Second Justice.—The Honorable CHARLES BURTON.

Third Justice.—The Honorable PHILIP CECIL CRAMPTON.

Fourth Justice.—The Right Honourable LOUIS PERRIN.

COURT OF COMMON PLEAS.

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RICHARD MOORE, Esq.

MEMORANDA.

On the 22d of July last, the Right Honorable STEPHEN WOULFE, Lord Chief Baron, died at Baden-Baden; in consequence of which the following appointments took place:—The Right Honorable MAZIERE BRADY, her Majesty's Attorney-General, to be Lord Chief Baron; DAVID R. PIGOT, Esq., her Majesty's Solicitor-General, to be Attorney-General; RICHARD MOORE, Esq., her Majesty's Third Sergeant, to be Solicitor-General; and JOSEPH STOCK, Esq., LL.D., to be her Majesty's Third Sergeant.

On the 23d of May last, WILLIAM CURRY, Esq., her Majesty's Third Sergeant-at-Law, was appointed Master in Chancery, in the room of RODERICK CONNOR, Esq., who died a short time previously; and RICHARD MOORE, Esq. was at the same time appointed her Majesty's Third Sergeant-at-Law.

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CORRIGENDUM.

Page 364, 9th line from top, *for* 'they are afterwards summoned,' *read* 'they are
NOT afterwards summoned.'

C A S E S
IN THE COURTS OF
QUEEN'S BENCH, COMMON PLEAS,
AND EXCHEQUER.
IN MICHAELMAS TERM, 1839.

QUEEN'S BENCH.

Friday, May 24th, 1839.

REPLEVIN—PLEADING—STATUTE OF LIMITATIONS—
RENT.

WILSON, in *Replevin*, v. JACKSON and others.*

REPLEVIN. The declaration stated that the defendants, on the 9th day of August, 1838, at Teemore, in the parish of Mullabrack, in the county of Armagh, in, &c., took the cattle, to wit, &c. The avowry to this declaration was as follows:—"And the said Robert William Jackson, "in his own right well avows; and the said William Jenkinson and "James Jeffrey, as bailiffs of the said R. W. Jackson, well acknowledge "the taking of the said goods and chattels in the said declaration mentioned in the said places respectively, in which, &c., justly, &c., because they say that the said plaintiff for a long time, to wit, for the "space of five years next before and ending on a certain day, to wit, on "the 25th of March, 1836, and from thence until and at the said time, "when, &c., held and enjoyed the said several places in which, &c., "respectively, with the appurtenances, among other premises, as tenant "thereof to the said R. W. Jackson, under and by virtue of a certain "demise thereof to the said plaintiff theretofore made, at and under a "certain yearly rent, to wit, the yearly rent of £13. 18s. 9½d., payable "on the 25th day of March and 29th day of September in each and "every year thereof, and because the sum of £69. 13s. 10½d of the rent "aforesaid for the space of five years, ending as aforesaid on the said "25th of March, in the year aforesaid," &c., and concluded in the usual

In replevin, the plaintiff declared for a taking on the 9th of August, 1838, and the defendant avowed for 5 years of arrears of rent next before and ending on the 25th of March, 1836, due to the defendant by virtue of a demise theretofore made. To this avowry the plaintiff pleaded, amongst other pleas, a plea of the recent statute of limitations (3 & 4 W. 4, c. 27, s. 42,) to the whole amount of the arrears. The defendant demurred, principally on the ground that the plea of the statute should have been confined to the period of the five years which were outside six years, but the Court overruled the demurrer.

The recent statute of limitations applies to conventional rents between landlord and tenant.

* This case was omitted in its proper place.

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form. There was a second avowry, which only differed in stating the rent to be £13. 18s. 9½d. To the first avowry and cognizance the plaintiff pleaded, first, *non tenuit*; secondly, *riens* in arrear; and thirdly, a plea of the recent statute of limitations (3 & 4 W. 4, c. 27, s. 42), which was as follows:—"Saith, that by reason of any thing therein alleged, "the said Robert William Jackson, in his own right, ought not to "avow; and the said William Jenkinson and James Jeffrey ought "not to acknowledge the taking of the said cattle, goods, and chattels in the said places respectively, &c., and justly, &c., because he saith "that the said supposed rent in the said first avowry and cognizance "mentioned did not, nor did any part thereof become due to the said "R. W. Jackson, nor was any acknowledgment of the said rent, or any "part thereof, in writing, given to the said R. W. Jackson, or to his "agent, signed by any person by whom the same was payable, or his or "her agent, at any time within six years next before the taking of the "said cattle, goods and chattels, &c., as for and in the name of a distress, in manner and form as the said R. W. Jackson, W. Jenkinson, "and James Jeffrey have above in their said last-mentioned avowry "and cognizance in that behalf alleged; and this the said plaintiff is "ready to verify," &c. Similar pleas were put in to the second avowry, with this exception, that in the corresponding plea of the statute, the acknowledgment was denied in the following manner:—"And no acknowledgment of the said rent, or any part thereof, in writing, was "given to the said," &c. To these pleas the defendant demurred, and assigned the following causes of demurrer:—"For that the said plaintiff hath not therein or thereby confessed and avoided, nor yet traversed any material allegation contained in the said avowries, to which "the same are respectively pleaded as aforesaid, and for that the same "are uncertain and argumentative, and that it is uncertain and ambiguous whether the said plaintiff alleges therein that no rent became "due to the said R. W. Jackson, as that no rent became due within six "years before the taking of the said distress, and for that the matters "alleged in the said pleas cannot be referred with certainty to any specific part of the said arrear of rent so due and owing, as in said avowries and cognizance mentioned; and thereby the said defendants are "prevented from aptly replying to the said pleas, and for that the said pleas are in other respects uncertain," &c. Joinder in demurrer.

Mr. Napier. —The plea of the statute of limitations is in bar of the entire avowry, which states an arrear of rent for a period of five years, ending on the 25th of March, 1836. Such a plea has been held to be bad; and in *Comyn's Digest*, T. Temp. G. 19, it is laid down, that "If "there be a contract for an annual payment, and the plaintiff sues for "the arrears of twenty years, the statute of limitations cannot be

"pleaded to the whole;" and for that principle, he refers to the case of *Harvey v. Thorne* (a), and this objection is a ground of general demurrer. *Earl of St. Gorman's v. Willan* (b). The regular mode of pleading, in such a case as this, is to take so much of arrear as is outside six years, and plead the statute to so much; and then, as to the remainder, whatever plea the defendant pleases, *Paget v. Foley*; in which case two of the Judges expressed a strong opinion, that this statute did not extend to rent reserved upon an indenture. In *M'Kiernan v. Halliday* (c), where this Court held the statute did apply to rent reserved on an indenture, the avowry was for sixteen years' arrears, without stating to what time, and the plea was allowed in that case; but, in the present case, the rent is stated to be due in March, 1836, and the years are thus fixed specifically.

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Friday, June 7th.


Mr. *Ross S. Moore, contra.*—The argument in support of the demurrer proceeds altogether upon the assumption, that the period mentioned in the avowry, during which the rent is stated to have accrued due, is material; and that the date (viz., the 25th of March, 1836) on which that period is stated to have ended, is also material. But it is submitted, that neither the period of five years mentioned in the avowry, nor the time at which that period is stated to have ended, is material:—First, from the language of the statute giving the general avowry; secondly, from the form of the avowry and cognizance in the present case. In the first place, the 25 G. 2, c. 13, s. 4, *Ir.*, the statute corresponding to the 11 G. 2, c. 19, s. 22, *Eng.* was passed to remedy the inconvenience occasioned by the great precision necessary at common law. There are three things which that statute renders it incumbent on the avowant both to *state* and to *prove*. And they are the only substantial and material matters which the defendant in replevin need either aver in his pleading, or prove at the trial. First, the contract or demise under which the plaintiff in replevin holds; secondly, his enjoyment of the premises under it; and thirdly, the sum due, at the time of the distress for rent, to the avowant, as landlord, by virtue of that contract. This appears from several authorities, and amongst others, from the judgment of BUSHE, C. J., in *Charters v. Sherrock* (d), to be the true construction of the statute. In fact, the material averment in an avowry under the statute is, that the plaintiff in replevin enjoyed the premises whereon the distress was made under a grant or demise, at a certain rent, for the period during which the rent distrained for "incurred," or was growing due. The distinction is this: The *contract*, by virtue of which the rent becomes due, must be truly stated; 2 *Saund. Rep.* 312, note (a),

(a) Allen R. 62.

(b) 2 B. & C. 216.

(c) 4 Law Rec. N.S. 58.

(d) Alc. & Nap. 21.

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Brown v. Sayce (a); but neither the *time* during which the rent is alleged to have become due, nor the *amount* of the rent avowed for, need be proved exactly as stated in the pleadings. The true test of the materiality of these allegations is the *evidence* which would be necessary to sustain them in case issue were joined and the parties went to trial. It has been clearly settled, that neither the time stated in the avowry nor the amount of the rent stated to be in arrear is material; *Forty v Imber* (b); 2 *Selwyn's N.P.* 1223, *last ed.*; *Harrison v Barnley* (c). In 2 *Starkie on Evid.*, 717, and 2 *Phillips on Evid.*, 180, the substance of the issue is said to be whether any rent be in arrear. So here the defendants would sustain their avowry and cognizance if they could shew at the trial that any sum whatever was due and in arrear for rent; and they would not be bound to prove either that the whole sum of £69. 13s. 10½d. for which they they have avowed and made cognizance, was due, or that the sum found to be in arrear became due *on the 25th March*, 1836. It is to be recollected that the portion of the avowry which forms the subject of the argument is not the description of the contract or the demise, which it is at once conceded is material, and must be proved as stated: but it is merely the statement of the time during which the tenant, or plaintiff in replevin, is said to have held and enjoyed the premises under the contract or demise set forth in the avowry. The statement of the contract is one thing, the statement of the tenant's enjoyment or occupation under it, is another. Secondly—If it had been stated in the avowry that the demise had been by indenture, there might have been perhaps some foundation for asserting that the time when the rent is stated to have become due is material; but, here it must be taken that the word "demise" in the avowry means a *parol* demise, and not a demise by deed. As an avowry is in the nature of a declaration, it might have been said that it was strictly analogous to a declaration in debt for rent on an indenture of demise, had the demise been stated to be by indenture; and, in that point of view, it might have been fairly contended that the time when the rent became due was material. The word "demise," however, in the absence of an express averment that it was by deed, must be taken to mean a demise by *parol*: 1 *Saund. Rep.* 291, *n.* 1. The avowry, therefore, in this case is analogous to a declaration in debt on a *parol* demise, or to a declaration in debt for use and occupation.—[CRAMPTON, J. It is more strictly analogous to a declaration in debt on a *parol* demise.]—It is; and if this analogy be complete, the time is immaterial. Such extreme strictness, as that contended for, is not requisite in an avowry under the statute. An avowry being in the nature of a declaration, as already observed, it is sufficient if it be good to a common intent; 7 *Bac. Abr. Replevin &*

(a) 4 Taun. 319.

(b) 6 East, 434.

(c) 5 T. R. 248.

Avow. K. In *Forty v. Imber*, it was alleged in the avowry, that the plaintiff held for two years, ending at Christmas, whereas it turned out that he held for a different period, and ending at a different time, and the variance was considered immaterial. The observations of Lord Ellenborough, in that case have a direct application to the question here. The report of the case of *Harvey v. Thorne*, cited at the other side, is both short and imperfect; at all events, it is clearly distinguishable from the present case. That was an action of *assumpsit*, founded upon a special contract; and, in such cases, it is necessary to prove the several averments in the declaration precisely as laid; *Smith v. Hickson* (a). Moreover, it is obvious, that the claim to *all* the arrears in that case could not have been barred by the statute of limitations. It is not necessary to contend that the defendant here would be at liberty, at the trial, to travel out of the *termini* specified in his avowry; for, even assuming as material the particular period adopted as the termination of the five years, and counting back from that date, it will be seen that two gales of rent became due outside six years, reckoning from the time at which the distress was taken; and proof that those two gales were in arrear would have been sufficient to sustain the avowry, in case the parties had gone to trial. Lastly, this form of plea has been already held good on demurrer by this Court, one of the pleas in bar in *M'Kiernan v. Halliday* (b) being identical in form with the plea in this case. In *Bruen v. Nolan*, Exchequer, Trinity Term, 1837, which was an action of covenant, the recent statute of limitations (3 & 4 W. 4, c. 27, s. 42,) was pleaded to all the arrears claimed, although a portion of them had fallen due within six years immediately preceding the commencement of the action. That being an action of covenant, the present is an *a fortiori* case. Upon the other ground of demurrer, it is submitted, notwithstanding the observations of some of the Judges in *Paget v. Foley*, that the 3 & 4 W. 4, c. 27, does apply to conventional rents reserved upon contracts between landlord and tenant, and is a good plea in an action of replevin.


Mr. *Napier* here abandoned this ground of objection, but insisted, in reply, that an action for use and occupation was not analogous. Suppose debt on demise and demurrer, would it be an answer to say, it was not necessary in your declaration for use and occupation, to state when the rent became due? It is analogous to debt on a demise, and in such an action it is necessary to state when the rent became due. Such a statement is particularly required in replevin, because in that action a set-off is not allowed.—[CRAMPTON, J. Have you looked at the precedents pleas of the statute of limitations?—There are no precedents,

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(a) Cas. Temp. Hard. 54.

(b) 4 Law Rec. 2d Ser.

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rent being a specialty debt, there could be no plea of the old statute of limitations. No such plea could be maintained in an action of debt on a demise; it must be a contract without specialty.—[CHAMPTON, J., having read the English statute, said—Such a plea may be pleaded under this statute, and there must be many precedents of such pleas.]—The case of *M'Kiernan v. Hulliday* is clearly distinguishable from the present case. In that case, the plaintiffs pleaded, and apportioned their pleas. With regard to the plea of *non tenuit*, all the authorities only go to this, that you cannot go out of the *termini*. In *James v. Salter* (a), the form of pleading, which I contend ought to have been adopted in this case, was employed in a plea under the statute. The precedents in 3 *Chitty on Pleading*, 5 ed. 1047, shew, that the time must be shewn in the avowry.

Monday, June 10th.

BURTON, J. this day delivered the judgment of the Court. After stating the pleadings, his Lordship said—The ground of demurrer is, that by the terms of the avowry, the whole claim cannot be barred by the statute of limitations, and the question principally turns upon the materiality of the dates in the avowry. Although the terms of the contract must be accurate, and a variance in respect to them would be bad, yet, it has been frequently ruled that the time stated is not material. In *Harvey v. Thorne*, the declaration was in *assumpsit*—demand for 28 years' arrears of annuity by contract of 1618, and defendant pleaded the statute of limitations to the whole demand; but the whole could not be barred, as appeared from the declaration, and therefore, the plea, which was to the whole of twenty years, was not good for the last six, and thus, there being no answer for the last six years, judgment was given for the defendant; but, in this case, the demand is for five years, and there is no objection to the plea going to the whole demand. The defendant is not bound by the particular days in the avowry, and he would be entitled to recover, upon *non tenuit* or *riens* in arrear, upon shewing half a year's rent due upon a different day from those named in the avowry.

Demurrer overruled, and judgment for the plaintiff.

(a) 4 Scott, 168.

Monday, November 4th.

GRAND JURIES—CHALLENGE—CORONERS—SETTING
ASIDE.

Ex-parte NOWLAN.

UPON the first day of Term, when the Officer was calling over the names of the Grand Jury for the county of the city of Dublin, the name of Alderman Perrin having been called, and he having answered, he was challenged on behalf of the applicant, a rate-payer of the city, upon the ground that the Alderman was disqualified, as being one of the coroners for the said city. To this challenge, a demurrer was put in on behalf of Mr. Perrin. The argument upon the demurrer was adjourned to this day, two affidavits having been filed in the mean time. The affidavit of Mr. Nowlan stated that he was, and had been for some time, a rate payer of the city of Dublin; that the coroner's remuneration was presented for by the Grand Jury; that the coroners of said city had the power of giving orders for medical witnesses attending upon inquests, to the amount of £5 each, and that said orders amounted to £169. 7s. for the half-year ending in Easter Term, 1839; that the amount of such orders has gradually increased since 1830 from £41. 17s. 1d. to that sum; that for the three years ending Michaelmas Term, 1832, the amount of said orders was £128. 5s. 5d.; in the three years ending Michaelmas Term, 1835, £164. 15s. 4d; and in the three years ending Michaelmas, 1838, £713. 7s.; and that according to the amount presented for said orders last Easter Term, they will amount, in the three years ending in Michaelmas Term, 1841, to £1,062. 2s.; that during the same nine years, the grand jury cess for said city has gradually increased from £18,306. 10s. 2d., which was presented in 1830, to £40,618. 8s. 5d. in 1838, and to the sum of £24,011. 8s. 2d. in Easter Term last, for the *half year* ending this Term; that such increase exceeded any reasonable necessity; that applicant's only motive in this proceeding was to prevent the jurors selected from being biassed by any personal interest. Alderman Perrin, in his affidavit, admitted that he was one of the coroners of the city of Dublin; that there are two coroners of said city; that the remuneration of coroners is regulated by act of parliament, whereby not more than forty guineas a-year can be presented for each of said coroners; and that he had no motive in resisting the opposition to his being sworn, than to assert the right of every man to serve as a grand juror when called, and, if sworn, to discharge his duty faithfully to the public.

When the argument upon the demurrer had proceeded to some length,

A challenge does not lie to a Grand Juror.

The coroner of the co. of the city of Dublin is not disqualified, at common law, or by statute, from serving upon Grand Juries for the county of the city of Dublin.

The Court has jurisdiction to set aside an incompetent person, when called upon the Grand Jury panel. *Semble.*

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the case of *Rex v. Sheridan* (a) was suggested by the Court, as decisive against the challenge, in which view Mr. *Fitzgibbon*, of counsel for Mr. Nowlan, having acquiesced, he then contended that he had a right to bring the facts in his affidavit under the notice of the Court, and that they were sufficient to induce the Court to interfere, and prevent Mr. Perrin from being sworn. The Court said this was quite a distinct proceeding, but that if counsel desired it, time would be given for the service of a regular notice of motion, to the effect he had mentioned.

Wednesday, November 6th.

On this day, the argument was resumed upon motion, to the discretion of the Court, grounded upon the facts stated in the affidavits.

Mr. *Fitzgibbon*, with whom was Mr. *Thompson*.—It is a conceded fact, that Perrin is an acting coroner of this city at the present moment, and his being so constitutes a valid objection to his being sworn upon the Grand Jury, and ought to prevail. "Coroners of the county—sheriffs ought not to return them upon any jury or inquisition." *Dalton's Sheriff*, 313.—[PERRIN, J. The meaning of that passage is this, that the sheriff should not bring them out of the county in which they reside. *Dalton* refers to *Fitzherbert*, N. B. 167, who gives a copy of the writ to the sheriff, the mandate of which is, that the coroner is not to be put in any assizes out of same county.]—The last paragraph in *Fitzherbert* is general, not to return them in any panel to Queen's Bench; and as that Court may sit any where, it is a general rule that they are not to be returned to that Court. The 4 Hen. 8, c. 12, has been on a former occasion referred to, as shewing that this Court had not power to do what we, by the present motion, call upon your Lordships to do; but that act goes much further: it gives the Court of Queen's Bench in England power to strike out any name in the panel, and substitute for them any new names; in fact, a power altogether to reform the panel. This is not, therefore, any evidence that this Court had not the power inherent in itself, without that act at all, to refuse to suffer an incompetent person to be sworn upon the jury. The 6 & 7 W. 4, c. 116, s. 32, expressly excludes, amongst other officers, coroners of counties from serving on grand juries; but the introduction of their name into this section is little evidence, that if not introduced there, this Court could not exclude them. At common law, the grand jury had no control over coroners, nor did they pay them; the control they have at present is altogether statutable, and, in the county of the city of Dublin, is regulated by the 1 G. 4, c. 28. That statute enacts, that grand jury shall not present any money to a coroner

(a) 31 State Trials, 543; S. C. Ridg. Rep.

who has neglected his duty, and also a discretion as to his remuneration, and the proportion to be paid to each coroner; and thus, almost as strongly as if it in express terms declared that he should not sit upon the grand jury; and therefore, whatever power he may have had at common law, the act which gives the grand jury this control over him, is tantamount to an express enactment excluding him. It comes within the principle, that a person should not be a judge in his own case, and the legislature never would have placed that control in the grand jury, if it intended that the object of it was to be a member of that body. The question for the Court in this case is, whether it has the power to keep an improper person off the grand jury? Suppose an alien or an alien enemy was called, could it do so? If it could, there is no argument in favor of the Court exercising that power in those cases that does not apply to the present. The Court has its various functions: the Judges form one class, the jury another. The Judges and certain Ministers of the Crown are excluded. The Court will take notice of the coroner and of his functions; he has judicial duties, and he has ministerial duties also. If the sheriff returned himself, there is no more authority for refusing to swear him, than there is for refusing to swear a coroner. The statute which gives the grand jury power to tax the public, must intend that they have no peculiar or private intention to control them, and thus, by implication, excludes coroners; and if the Court found a person about to be sworn, and that the fact of his being a member of the grand jury would vitiate an indictment, surely the Court would be active to prevent such an occurrence.—[PERRIN, J. Against the implication of exclusion drawn from the interest which Perrin may have in his own presentment, we have the invariable practice, before the recent act, of persons sitting on grand juries, for whom presentments were made, without any objection being made to that practice. Does the 3 & 4 W. 4, c. 91, affect this question?—I do not conceive that it does. The second section expressly excludes them from being inserted in the petit jury lists, but the act does not appear to him to affect the constitution of grand juries.

Sergeant *Greene* and Mr. *West*, Q. C., with whom was Mr. *Semple*, *contra*. There has not been any proposition stated, which proves that Alderman Perrin is disqualified from serving upon grand juries. We do not mean to contend that the Court has not power to interfere with the panel, if such gross abuses arose, as did in England, when the 3 Hen. 8 was passed, and which are recited in the preamble to that act. That statute was passed to control the sheriff, and it proves that the sheriff had, at the time it was passed, power to return whom he pleased. The present motion is grounded altogether upon the personal disqualification of the individual, not upon the misconduct of the sheriff. A passage has been cited from *Fitzherbert's N. B.*: that passage occurs under the

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head of "writs," and merely shews this, that a coroner may sue out a writ to excuse himself from acting; and was it ever heard that the privilege of excusing one's self from acting was a proof of disqualification to act? Is it not conclusive, that if the party did not wish to have himself excused, he had full power to act? And the terms of the writ also are, "out of the same county," and "in actions" sued in the King's Bench, &c. In *Chitty's Cr. Law*, 307, it is laid down, that an alien is disqualified, and some others; this case has been put by counsel on the other side, and it is not disputed that, in such cases, the Court has jurisdiction to interfere and set such persons aside. In *Bac. Abr. T. Juries Letter E. 6*, this interpretation is put upon the passage in *Fitzherbert*. The ground of objection, as to Mr. Perrin's being interested in one of the presentments, has been answered by the statement of the custom which has universally prevailed; but such a principle does not exist at common law or by statute. As to the medical witnesses, the argument was all wrong, for the enactment directs that the *foreman* shall pay them, under the order of the coroner, and the grand jury have no control whatever in this respect.—[Mr. *Fitzgibbon* having read the section]—BUSHE, C. J. said that it had been hitherto argued that Alderman Perrin was personally interested in the presentments which he would have the power of voting upon, whereas in respect to the sum paid to medical men, his whole interest appears to consist in paying the money away.]—The 6 & 7 W. 4, c. 116, s. 32, which, by express enactment, excludes them, shews there is no common law principle upon which coroners are excluded from serving upon grand juries, and that it requires an express enactment to effect such exclusion. A case might arise, in which, from misconduct, he ought to be deprived of all salary; but it would be against every principle of justice in the Court, to presume that such a case existed. In *The Complete Jurymen*, 11, it is laid down, that at common law, the only disqualification is, that he was not a *probus et legalis homo*.

Mr. *Thompson* replied.—The duties of a coroner are fully stated in *Jervis on Coroners*, 248, and the performance of them is quite inconsistent with his duties as a grand juror: they are judicial and ministerial. It is clear, from the recitals in the 3 Hen. 8, c. 12, that that act is merely declaratory, and that this Court had, at common law, power to reform the panel. If a party be interested in the matter to be tried, it is a principal challenge to a petit juror, and, in analogy, would exclude a grand juror.

BUSHE, C. J.—We are all agreed that there is no statutable enactment excluding coroners from serving as grand jurors, and we do not think they were disqualified at common law. No injury has been done

to the applicant, but this motion is a *quia timet* proceeding; and upon these grounds, we must refuse the application.

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BURTON, J.—This question comes now before us, not upon challenge, but upon an application to the discretion of the Court; and we must decide whether, under all the circumstances of this case, we should direct Alderman Perrin's name to be struck out, and the panel in that respect reformed. I will not say, that although the statute 3 Hen. 8, c. 12, does not extend to this country, that there are not cases in which the Court may exercise a jurisdiction such as we are called upon to exercise in the present case, if a person, not within the definition of *probi et legales homines*, should be called upon the jury. The question in the present case, therefore, is, whether, in the exercise of its sound discretion, the Court should now direct the name of Mr. Perrin to be removed? It is said, that being a coroner is sufficient to exclude him, and renders him incompetent to be a grand juror; and if that were so, it would bring the case within the cases to which I have referred. But as far as I can form an opinion from the enactment in the 3 Hen. 8, I should say, that a coroner was not incompetent at common law; but, on the contrary, judging from what has been cited as the common law upon this question, I should say, his not serving as a grand juror depended on his own will; and if he choose to avail himself of the exemption in his favor, that he could relieve himself from the duties of a grand juror; but, as far as I was able to see, there is no such thing as that at common law, the office of coroner rendered a party incompetent as a grand juror. It is clear, from the 3 Hen. 8, that the utmost the common law did was to create an exemption; and I cannot, therefore, see that the Court would exercise a sound discretion in removing Mr. Perrin, unless a great necessity for it existed. The only necessity which has been alleged is, that while attending as grand juror, he may be called upon to perform some of his duties as a coroner; but that argument cannot have much weight, when we consider the many cases in which every grand juror may be obliged to absent himself. Every person acquainted with the proceedings at assizes, must be familiar with many cases in which this occurs. The only remaining question is, whether we should remove him upon the ground of interest, but that cannot create any difficulty, from the nature of that interest; and as the legislature has, in legislating on grand juries, provided for those who should not serve, and has not included in that enactment the present case, we cannot hold that Mr. Perrin is incompetent. The 6 & 7 W. 4, c. 116, is not declaratory, and the 32d section does not extend to the county of the city of Dublin. The rate-payer has also other remedies, if there should be any abuse in the proceedings of the grand jury.

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CRAMPTON, J.—If this were an application made in one of the counties, the motion would rest on substantial grounds. In point of form, the motion is not correct, as I do not think the Court has power to reform the panel, without the act of the 3 *Hen.* 8; but it should be to have Mr. Perrin's name removed, he being an incompetent person. The attendance of a grand juror is not voluntary—he is bound to attend. This objection was first raised by challenge, but *Sheridan's* case concluded all argument upon that ground; and that case is not an authority upon the right of challenge alone, but goes much further, as it was a case much considered, and the counsel in that case would have retired to a motion to reform the panel, if they thought it tenable; and that case is nearly similar to the present. If the common law disqualified coroners from serving on grand juries, why was it necessary to legislate on the subject? One or other of the two propositions laid down by Mr. *West* should be established: first, that at the common law coroners were disqualified; and secondly, that the Court has jurisdiction to remove them. As to the first, counsel for the motion have failed to shew that coroners were disqualified at common law; and as to the ground of interest which has been relied on, there is no authority or *dictum* to the effect that a grand juror can be put aside upon that ground. With respect to the second proposition, whether the Court has jurisdiction to exercise its discretion, in analogy to the 3 *Hen.* 8, it has been asked, if it appeared plainly to the Court, that an incompetent person was called upon the grand jury, whether it would not say, "Pass that gentleman by?" But that involves very important considerations, and there are many cases in which the Court will not interfere. One of these cases is *Sheridan's*, where the Court left the party to plead; and, in the present case, the party being a rate-payer, may have, on traverse, a power of raising this objection.

PERRIN, J.—I am of opinion that the question in this case is, whether Mr. Perrin is or is not disqualified? Because if he be disqualified, this Court has full power, and would be bound to set him aside. The 3 *Hen.* 8 does not extend to Ireland, and we therefore cannot reform the panel. It might be better that no interested person were upon it, and also, that a coroner, who is subject to the control of this body, should not form a part of it; but we have not power to legislate upon this subject. He was not disqualified at common law. *Fizherbert's N. B.* 657, shews, beyond doubt, that he was qualified to serve as a grand juror. I at first thought the 3 & 4 *W.* 4, c. 78, might affect this question, but Mr. *Fitzgibbon* admitted he did not think it did. My brethren are of the same opinion; and the 32d section of the 6 & 7 *W.* 4, c. 116, strongly fortifies that opinion. As to interest, it has been justly observed, that it is open to the parties to raise this objection in another form. The only opinion I would be understood to express is,

that coroners are not, at common law, disqualified generally, nor, as far as respects the city of Dublin, by statute.

No rule.

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Wednesday, November 5th.

**PRACTICE—BOND AND WARRANT—ENTERING
JUDGMENT—TRUSTEES—HUSBAND AND WIFE.**

CAMPION v. CAMPION.

MR. MOCKLER applied for liberty to enter judgment against Henry Campion upon his bond and warrant. The motion was grounded upon the affidavit of Anne Campion, the wife of the obligor, which stated that he executed the bond and warrant unto Francis Durham and Samuel Campion, trustees named and appointed in a settlement executed upon the marriage of the deponent with the said Campion, in the year 1830, conditioned for the payment of £350; that same was executed for the amount of property belonging to deponent, which was handed over to the said H. Campion in consideration of said bond and warrant, and was intended as a provision for deponent; that the amount of said bond is still due, and that said H. Campion is still living. An affidavit by H. Campion corroborated these facts.

Upon these affidavits, an application was made before BURTON, J. in Chamber, for liberty to enter up judgment against the obligor, but his Lordship refused that application, as it did not appear that the trustees in the settlement were parties to it, or had any notice of this proceeding.

The motion was now renewed, upon a further affidavit by the attorney of Anne Campion, which stated that a notice was served upon the two trustees upon the 29th of October, calling on them to proceed to enter judgment upon the said bond and warrant, and issue execution thereon, in order to levy the amount thereof; that the said Francis Durham returned an answer, stating that before he could sanction any proceedings, he required the written authority of said Samuel Campion, his co-trustee, to consent to the proceedings mentioned in the notice of the 29th of October, and also two sureties to indemnify him from all damages, losses, &c. which might be incurred in same; that the said Samuel Campion did not return any answer to said notice, but that he caused an attachment to issue against the said H. Campion, marked for nearly £200, under which his goods were seized, and to which said H. Campion caused bail to be given; saith, that unless leave be now given to enter judgment upon said bond and warrant, the sum secured thereby will be lost, in consequence of the neglect or refusal of the

Where a motion was made on behalf of the wife, to enter up judgment in the names of the trustees in a marriage settlement, upon a bond and warrant of the husband's, passed for the amount of the wife's property, and it appeared that the trustees refused to enter judgment, and one of them had issued an attachment against the obligor's goods, that the sum secured on the bond would be lost; but the trustees had not received specific notice of this motion, the Court refused the application.

The proper course is to file a bill in Equity.

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said trustees to act in the trusts of the settlement. Under these circumstances, it was submitted that the motion ought to be granted.—[BURTON, J. Have the trustees received notice of this application?]—In the notice calling on them to proceed, it was stated that unless they did so, an application would be made to the Court.

BURTON, J. was of opinion that the trustees should have received the usual notice of motion in this case, in order that they might obtain security or indemnity before they entered judgment, or might altogether disclaim, if they did not wish to act in the trusts of the settlement. It would be going much too far, upon a motion of this kind, to enter judgment in the names of trustees, and who have not consented. That may be done by a bill in equity, or by some other means: but a motion to enter judgment and issue execution in the names of persons who will not, perhaps, act in the trusts at all, cannot be entertained.

No rule.

—◆—
Monday, November 9th.

FRIVOLOUS DEMURRER—SETTING ASIDE—MARKING JUDGMENT.

SCULLY v. O'BRIEN.

Where a frivolous demurrer was filed on the last day of Trinity Term, and a trial at the following assizes thereby lost, the Court set it aside, and would not allow the defendant in to plead.

MR. HOBART moved to set aside the demurrer in this case, as frivolous, and for liberty to enter up judgment for the plaintiff. It appeared that the demurrer was filed upon the last day of Trinity Term; that subsequently, this motion was made in Chamber, in order that a trial might not be lost at the last assizes, the venue being in the county of Tipperary, but that that motion was refused, the Judge doubting his jurisdiction to entertain the motion in Chamber,* and we have thereby lost a trial.

Mr. W. G. Kelly said he did not draw the demurrer in this case, and admitted he could not support it; but he contended that the notice should be in the alternative, either to set the demurrer aside, or argue it forthwith. He also contended, upon the authority of *Bayley v. Glanville*, that he was entitled to plead. It was an action for *mesne* rates, and he understood there was a substantial question to be tried: but

Per Curiam.—There is no affidavit of merits in this case, and the

* *Ante* Vol. 1, 287.

defendant can have the same advantage upon a writ of inquiry which he would have upon a trial. Therefore, we must grant this application.

Motion granted, with costs.

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Tuesday, November 5th.

PRACTICE—ENTERING JUDGMENT—JOINT AND SEVERAL BOND.

WALLACE v. RUSSELL and two others.

MR. HANNA moved for leave to enter up judgment against Russell, on a warrant of attorney executed by him and two other obligors, several judgments having been formerly entered up against the two others. The bond was in terms expressly joint and several; the warrant was to confess a "judgment or judgments," &c. in a "declaration or declarations," but in other respects purported to be joint, and not several.

PER RIN, J. inclined to think this a joint warrant, and that it did not authorise a several judgment; but gave permission to mention the matter again, when the Court was full.

Mr. Hanna subsequently, before the full Court, argued that this warrant being given along with a joint and several bond, it must be inferred that the parties intended it to be several as well as joint; and that this case was distinguishable from the case of *Gee v. Lane* (a). The words used there, viz., "action," and "judgment," being in the singular number, and not in the plural, as here. He also suggested that this case was distinguishable from the English cases in another particular, as he believed it was the practice there to give a warrant without any bond, and, therefore, the Court could only look to the warrant itself for its interpretation.—[BURTON, J. That is the case in many instances.]—Mr. Hanna also mentioned the cases of *Executors of Maxwell v. Johnson* (b), and *Henry v. Hampton* (c).

Tuesday, Nov. 12th.


CRAMPTON, J. this day said, that the Court, having considered the documents on which the motion was made, thought it proper to grant it. In one of the cases cited (*Henry v. Hampton*), the warrant only mentioned the word "judgment" in the singular number, but, in this

Where on a motion for leave to enter up judgment against one of three obligors in a bond, it appeared that the bond was in terms joint and several, and the warrant was to confess a "judgment or judgments," &c. in a "declaration or declarations," but in other respects purported to be joint, and not several—*Held*,—that from the terms of the warrant, it might be inferred that the parties had several judgments in their contemplation as well as a joint judgment, and leave was given accordingly.

(a) 15 East, 592.

(b) Glasc. R. 216.

(c) 6 Law Rec. 247.

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case, it contained the words "judgment or judgments," from which it might be inferred that the parties had several judgments in their contemplation, as well as a joint one.

Motion granted.

Thursday, Nov. 14th.

**PRACTICE—ENTERING JUDGMENT—JOINT BOND AND
 WARRANT—DEATH OF ONE OBLIGOR.**

COLEMAN v. COX.

Judgment cannot be entered upon a joint bond and warrant against the survivor, after the death of one of the obligors, but the party will be left to his action on the bond.

MR. O'LEARY applied, in this case, for liberty to enter up judgment against the surviving obligor in a bond. It was a joint bond and warrant of September, 1829, the words of the warrant being, that the obligee should be at liberty to enter up a judgment. One obligor died in 1833, the other obligor is the heir and executor of the deceased; and counsel urged, that as the liability of the survivor was not altered, and this motion would save considerable expense, the Court would be disposed to grant the motion; but

CRAMPTON, J.—The warrant is defunct in law by the death of one of the obligors, and the party must bring his action on the bond.

Motion refused.

Saturday, November 9th.

**GRAND JURIES—CONDITIONAL PRESENTMENTS—FORM
 OF AFFIDAVIT, &c.—BOARD OF WORKS.**

THE QUEEN v. M'KAY.

Where a presentment was passed in 1839, and two traverses taken to it, one for inutility, and the other for damages, by the same person—*Held*, that the Court will not, upon motion by that person to quash the presentment in the following Michaelmas Term, attend to objections as to the insufficiency of the affidavit and estimate, upon which the presentment was founded. *Held, also*, that the presentment being expressed to be made upon condition that a certain sum would be advanced by the Board of Works and Mr. L. did not render the presentment void.

THIS was a motion to quash a presentment of Easter Term, 1839. There had already been a traverse to said presentment by the defendant, for inutility and a conditional traverse for damages, and the objec-

tions to the presentment which were now relied on, were taken on the trial of the traverses, but were not then pressed, it being suggested that that was not the most fitting time to make them.

It appeared that the usual affidavit to ground the presentment was made by David Charles Latouche and John Davis, and stated the proposed line of road was from New Grange, in the parish of Whitechurch, to the road leading from Enniskerry to Dublin, by Stillorgan, and the schedule annexed thereto was as follows:—

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Estimate of a proposed Road from ——— to Kingstown, between Cross Roads at Grange and Mr. Hanly's House.

Masonry Perches.	Lineal Perches.		SUM.	TOTAL.
			£ s. D.	£ s. D.
	170	Rock cutting, @ 2d. ⚡	85 0 0	
		Formation through rock, @ 15s. ⚡	127 10 0	
		Earth cutting and filling, @ 5s. ⚡	31 5 0	
	327	Foundation through arable		
		@ 5s. per	81 15 0	
	497	Gravelling & metalling, @ 10s. 6d. ⚡	260 18 6	
		Earth and sod fences, including catch		
		water, drains, &c., @ 2s. ⚡	60 0 0	
	394	Dry-water fences, @ 2s. ⚡	98 10 0	
			744 18 6	
		Contingencies and superintendence,		
		@ £5 ⚡ cent.....	38 12 11	783 11 5
		6A. 0R. 34P. of ground, not brought		
		into calculation		
		Second Division, from D. to E.		
		This contained similar items, and		
		amounted to.....		424 8 11
				1208 0 4

Copy Presentment of Grand Jury.

County of Dublin, } EASTER TERM, 1839.
to wit. } WE, the Grand Jury of, &c., assembled at the
Easter Term, in pursuance of the 26 G. 3, c. 14,
do present the sum of £600, for the purpose of constructing a new line from New Grange, in the parish of Whitechurch, to Mr. Hanly's gate, on the lands of Murphystown, all in the barony of Rathdowne, on condition that the Board of Public Works and Mr. Latouche will advance the sum of £608. 0s. 4d. for the completion thereof; and further, in pursuance of the powers to us in that behalf given, in and by an act of the 1 and 2 W. 4, c. 33, s. 23, and to enable us to borrow the said sum of

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£600 from the Commissioners, &c., we present that the said sum be raised and levied upon the barony of Rathdowne, by half-yearly instalments of £30 each: the first of said instalments so to be raised after the ensuing Michaelmas Term, and the remaining instalments after the next and each and every successive presenting Term, until the whole of said sum shall be raised and discharged.

There was a further presentment, to raise £100 to pay the interest of said sum of £600, or such further, &c. until the whole should be repaid.

There was also a map of the lands, shewing the townlands, &c. through which the proposed road was to pass, and references, by letters, to the several parts of it, from the schedule to the affidavit.*

Mr. Bennett, Q. C., with whom was Mr. Fitzgibbon, in support of the motion, said there were two objections to this presentment:—The first was, that the affidavit on which it is grounded was not in conformity with the form prescribed by the statute;* and, secondly, that it was a conditional presentment. A presentment and indictment are convertible terms—[BUSHE, C. J. In certain cases]—And who ever heard of a conditional indictment? Who is the person to judge whether the condition has or has not been performed?

* *The following are the principal statutable enactments that were referred to:*

26 G. 3, c. 14, s. 18, enacts:—
 “That the grand jury shall not
 “make any presentment for the
 “levying any sum of money, either
 “on the county at large, or on any
 “particular barony, for executing
 “any kind of work, unless an affidavit, sworn before a justice of
 “the peace of the county, to
 “ground the presentment, in one
 “or other of the following forms,
 “as nearly as the case may require,
 “shall be laid before them,” &c.:

After setting out the forms, if the presentments be for erecting or repairing court-house, &c., it proceeds to state the form when the presentment is for a new road, the material part of which is as follows:—“And that they caused
 “a notice to be left at the habitation of every person holding or
 “occupying the lands through
 “which the said intended road,
 “&c. is to be made, &c.; and the
 “estimate shall set forth that it is

“an estimate for making a new
 “road from , in the barony
 “of , to , in the barony
 “ny of , and shall particularise
 “rise the intended breadth of the
 “road, and the number of perches
 “that it is to pass through each
 “townland in each barony, together
 “with the sum it will require
 “to lay it out, to make level and
 “mould it through each townland,
 “and the sum necessary to
 “make fences on each side through
 “each townland.”

The 23d section enacts, that when the road is bounded by different baronies, the expenses should be divided, &c.

1 & 2 W. 4, c. 33, s. 24, enacts,
 “That grand juries may make presentments for any public works,
 “in order to maintain advances for
 “the same from the Commissioners of the Board of Works, payable by instalments.”

—[*Per Curiam*. There are many instances in which there is a presentment for six pence; a proprietor undertaking the expense of the road.] By the 18th section of the 26 *G. 3*, c. 14, it is made a condition precedent, that such an affidavit, together with the plan and estimate, as therein set forth, should be made before any presentment can be passed; and, in the present case, this affidavit is defective, in not shewing the lands through which the new line is to go, and other requisites, which not being performed, the presentment cannot stand.

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Mr. Hatchell, Q. C., and Mr. Brewster, Q. C., contra.—The defendant cannot be heard now making these objections. The presentment was passed, and when it came to be filed, instead of making them, he took a traverse for inutility, and a conditional traverse for damages, both of which have been tried; the first having been found against him, and, upon the latter, damages awarded to him. It would be attended with great inconvenience if a party was, after such traverses, and taking his chance of two trials, to be allowed to make such objections as these, which are in the nature of special demurrers. It is not to be taken that presentments are to be framed as accurately as indictments. This presentment is for £600, and then it refers to the Board of Works, the Commissioners of which are authorised by the 1 & 2 *W. 4*, c. 33, s. 23, to make advances upon the presentments of grand juries, if they should think fit.—[*CRAMPTON, J.* Every presentment, in cases in which the Board of Works makes such advances, must be conditional, because the grand jury cannot compel the Board to advance.]—Upon reference to the 18th sec., and also to the 23d sec. of the 26 *G. 3*, c. 14, it is plain that the different baronies need only be stated in the affidavit, when the road runs through different baronies. In the present case, it runs through only one barony, and such statement would, therefore, be superfluous, and is at all events sufficiently done by describing, as we have accurately done, the *termini* of the road. If there were negative words in the act, the objection as to the number of perches in each townland, &c. not being specified, might prevail; but if any rate-payer could be heard with such an objection, least of all could the present applicant, who, by his two traverses, pre-supposed the presentment a valid one, be heard now saying, that all he said before was wrong. This is a motion to the discretion of the Court; and if there be a substantial compliance with the provisions of the act, the Court will not, after what has happened, listen now to such objections. The provisions of the statute which have been referred to are directory, and come within the authority of *Wynne v. Martin (a)*, and *Lessee of St. Patrick's Hospital v. Dowling (b)*. This consequence is involved in the decision which the

(a) Batty, 110.

(b) Batty, 296.

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Court is called upon to make, that parties may come in, in one, two, or three years, and quash presentments on formal objections.

Mr. *Fitzgibbon* replied.—The provisions in the act of parliament are not directory. Where an act directs two parties to do a certain thing, and also directs a public officer who has to act between them, if they do all they have to do, his not doing what he is directed to do will not vitiate what was to be done. This was the principle of the cases cited; and the judgment of the Lord Chief Justice, in the case of *Quin v. Aldwell* (a), bears out that view, and also the case of *Rachford v. Meadows* (b). In the present case, the statute directs that certain things should be done before any presentment should be made; and the affidavit is part of the record.—[BURTON, J. Does the act direct that the affidavit should appear on the face of the presentment?]—No, but it is preserved as a record in the Crown Office; otherwise, as no person but the grand jury could be present when this act was passed, they might burn it, if they pleased, in the grand jury room. The statute prescribes a particular form of affidavit, and an estimate, and that the estimate should particularise certain things; and if these documents be not in accordance with such directions in the statute, no presentment can be made upon it. If these items were specified, and they appeared extravagant, the presentment would be quashed; and this cannot be done if these facts may be omitted in the affidavit. If, for instance, also, the “intended breadth” of the road is not stated, how can a party know what damage the road will cause? Yet, not one word of this in the affidavit; nothing to shew the breadth of the road, or the number of perches in it: neither is there one word of the townland or barony, or the sum to be required to lay out fences, &c. Such a presentment would repeal the act of parliament.—[Mr. *Hatchell*. There is a map annexed, to which the affidavit refers, and which gives these particulars.]—It is said we are late with our objection, and that it is a technical one; but I contend it is one that goes to the very substance of the presentment; and the statute fixes no limitation within which such objections are to be made. In a civil bill case, the Judges turn parties round, if the addition or residence of a party be omitted, because it is a departure from the form prescribed. As to the second point, money is presented now, to be raised hereafter. The work is thus begun, and if the Board of Works should not afterwards think proper to advance this sum, the work falls to the ground.—[CRAMPTON, J. There is an enactment, that if this money be not advanced in a certain time, the presentment falls to the ground; and every presentment which is made in contemplation of an advance from the Board of Works must be conditional,

(a) *Batty*, 380.

(b) 3 *Esp. N. P. C.* 69.

no matter what words are used.]—The condition, however, here is, that Mr. Latouche should advance a sum of £608. The estimate annexed to the affidavit is £1208, and the grand jury present £600, on condition of getting £608 from Latouche. What security have the public that Mr. Latouche will ever pay that sum?—[CRAMPTON, J. You were aware of this objection when the presentment was passed.]—A party knows nothing of the presentments but what he hears read out when they come to be stated; and there is nothing to limit the applicant to make his objections at that moment.

At the desire of the Court, the case stood over, to allow counsel in support of the presentment to give additional information to the Court, as to the advance of £608 by Mr. Latouche.

Saturday, November 16th.

Mr. *Hatchell* this day handed in the affidavit of Mr. Latouche, which stated that he entered into the following written engagement with the Commissioners of Public Works:—"I hereby undertake to be responsible to you for the sum of £608. Os. 4d., or whatever additional sum may be required, in aid of the county presentment of £600, to complete the new line of road between," &c.

Mr. *Fitzgibbon* objected that this was a mere *nudum pactum*, not binding upon Mr. Latouche, and upon which no party could sue; but the Court considered it sufficient, and gave judgment against the motion.

CRAMPTON, J. said he was much struck with the objections, when they were made on the trial of the traverse; but the party having four days for considering these objections at the time of filing the presentment, and having passed that time, I do not think he has a right to take advantage of technical objections after that time. The case is therefore narrowed to one objection, namely, that this is a conditional presentment; and I know no authority for saying, that the condition in this case makes the presentment void. The condition is one most beneficial to the public; and is it to be said, that a grand jury is at liberty to treat in this way with parties, if they suppress it from the face of the presentment, and that if they put it upon the face of the presentment, it will make it void? Therefore, this motion to quash the presentment cannot be sustained, either upon principle or upon authority.

PERRIN, J. This is an application to quash a presentment of Easter Term, upon two grounds: the first, because some of the documents upon which it was founded did not contain all the particulars which the statute directs; and secondly, because it is a conditional presentment. As

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to the first objection, it is to be observed, that the application is made in Michaelmas Term, by a person who traversed this very presentment, and who is, therefore, by act of parliament, prevented from further interfering with it; and made also by one who had twenty days' notice of it, and who might have come before the grand jury, and before the Judge, and made those objections; but who, instead of doing so, takes two traverses, and now calls upon us to review and quash the presentment. The act is plainly directory as to the number of perches, &c.; but, independent of this, if the objection had been made in Easter Term, it might have been remedied. Upon these grounds, therefore, this application cannot prevail. I think that, upon the second ground also, this objection is late; but as to the merits of the objection, that a conditional presentment is bad and void, if there was any foundation for the suggestion that this was a contrivance or fraud, or bad precedent, the Court would be astute to prevent it; but we allowed time for Mr. Latouche to prove the engagement he entered into, and I find a conditional presentment not only authorised, but directed, upon a gentleman coming forward and undertaking a work at his own expense. The supposed analogy, therefore, between indictments and presentments does not hold, nor does such a condition as is annexed to this presentment make the presentment void.

Motion refused, with costs.

EXCHEQUER OF PLEAS.

*Monday, November 4th.*ARREST—NAME—DISCHARGE—23^d NEW GENERAL
RULE—PRACTICE.

SYMES v. BATT.

MR. ATTHERL moved that the defendant be discharged out of the custody of the sheriffs of the county of the city of Dublin, from arrest, under the writ of *capias quo minus* which issued in this cause, on entering a common appearance, inasmuch as he was described in the writ as "Benjamin W. Batt," he having been baptized and always called and known by the name of "Benjamin Whiston Batt." He also applied for the expenses incident to the arrest, and for the costs of this application, rendered necessary by reason of the plaintiff's non-compliance with the terms of a notice calling upon him to consent to the defendant's discharge.

The defendant had been arrested on foot of a promissory note, of which he was the maker. The note was signed "Benjamin W. Batt," and by that name he was described, both in the process and affidavit to hold to bail.

It appeared that he had filed his petition and schedule in the Insolvent Court, seeking to be discharged as an insolvent debtor, but that the petition had not yet been heard, the hearing having been postponed at the defendant's own instance.

This application was grounded upon the 23^d General Rule of Easter Term, 1834:—"When the defendant is described in the process or affidavit to hold to bail, by initials, or wrong name, or without a Christian name, the defendant shall not therefore be discharged out of custody, or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court, or a Judge in Chamber, that due diligence has been used to obtain knowledge of the proper name."

Mr. Revell, for the plaintiff, opposed the motion, upon the ground of its being unnecessary, the plaintiff having offered to sign a consent for the defendant's discharge, provided it were to be without prejudice to the proceedings in the Insolvent Court. The plaintiff's debt had been returned by the defendant in his schedule.

Where a defendant was arrested under a writ of *capias quo minus*, in which he was described by the initial of one of his Christian names, he was discharged, on entering a common appearance, although he had signed the promissory note upon which he was sued by the same initial, it appearing that due diligence had not been used by the plaintiff to obtain a knowledge of the defendant's proper name.

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Mr. *Atthill*.—The defendant is entitled to his discharge unconditionally; *Eggleso v. Stokes (a)*. No affidavit has been made by the plaintiff, as to his having used any effort, or made any inquiry to discover the real name of the defendant, which could have been easily ascertained. The plaintiff, therefore, so far from having used due diligence to obtain a knowledge of the proper name, has been guilty of gross neglect; and, in such a case, the terms of the rule are imperative.

PENNEFATHER, B.*—The mode of signature adopted by a party, in signing a bill of exchange or other document, is *prima facie* evidence of such being his proper name. There are cases, however, which shew, that where a party signs by his initials only, some inquiry should be made for the purpose of ascertaining the real name. We think that the defendant is, under the circumstances, entitled to be discharged from the arrest, upon entering a common appearance; but we think it fair to add, that it shall be without prejudice to the proceedings in the Insolvent Court, and without costs.

Order accordingly.†

(a) Batty, 213.

* The LORD CHIEF BARON was absent during the whole of this Term, in consequence of indisposition.

† *Vide* the 3 & 4 W. 4, c. 42, s. 12, the provisions of which, however, do not extend to Ireland.

Wednesday, November 6th.

PRACTICE—MOVING ON POSTEA—JUDGMENT.

PERRIN and WRIGHT v HODGENS.

Where the defendant has obtained a verdict, the plaintiff has no right to stop him from moving on the *postea*, by lodging with the Officer a sum sufficient for the payment of his costs, the defendant being entitled to have a judgment entered for him, & a protection against a future action.

MR. PALMER, on behalf of the plaintiffs, applied to the Court to stop the defendant from moving upon the *postea* in this case, under the following circumstances:—

The defendant having obtained a verdict, in order to save the expense of moving on the *postea*, his attorney was furnished by the plaintiff's attorney with a consent, whereby it was proposed that the plaintiffs should forthwith lodge with the Officer the sum of £50, on account of the defendant's costs, to be paid over to him as soon as the same should be taxed and ascertained; and in case that sum should prove insufficient, the plaintiffs further undertook to pay at once to the defendant any balance that might remain due. The consent was accompanied by a notice, requiring the defendant's attorney to furnish his costs, and to proceed to have them taxed, and cautioning him against taking any further proceedings in the case.

To this proposal on the part of the plaintiff, no answer had been returned.

Mr. *Dickson*, Q.C., for the defendant, opposed the motion, and stated that the action was brought upon a bill of exchange, and that the defence established was forgery. He submitted that the plaintiffs had no right to deprive the defendant of the protection of a judgment.

PENNEFATHER, B.*—The defendant is unquestionably entitled to have a judgment entered for him, in order to protect himself against another action; therefore,

Refuse the motion, with costs.

* *Solus.*

Monday, Nov. 11th.

PRACTICE—EJECTMENT—BILL OF PARTICULARS—PART AND PARCEL—MAP.

Lessee ROBERT ROSS *v.* The Casual Ejector.

MR. JAMES SHEIL, on behalf of Miss Ellen M. Bailie and her sisters, the owners in fee of the lands of Kilmacardill, in the declaration in ejectment in this cause mentioned, moved that the conditional order of the 8th of June be made absolute. That was an order that the lessor of the plaintiff should amend his declaration in ejectment, by describing the metes and bounds of the premises for which he had brought the ejectment, in order that the said Ellen M. Bailie, &c. might be enabled to take defence for such part of said lands as were formerly demised to William Ross, and which they now claimed.

An affidavit was made by the attorney for the applicants, stating that this was an ejectment on the title, brought by the lessor of the plaintiff, for the recovery of the possession of all that farm of land, containing, by estimation, thirteen acres and a half, situate in the towland of Kilmacardill, parish of, &c., and county of Tyrone, and in the ejectment described, as specified in and demised by a certain indenture of lease, bearing date the 15th Jan. 1795, between Wm. Bailie, then of, &c., and the lessor of the plaintiff of the other part. That the father of the lessor of the plaintiff died possessed of a considerable farm, whereof the premises for which this ejectment was brought formed a part, leaving three sons, William, John, and Robert, the lessor of the plaintiff. That after the death of their father, the three brothers resided together upon the

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In an ejectment on the title, where the question was one of part and parcel, the Court, upon the application of persons served with the ejectment, who were at a loss to know the particular parts of the lands sought to be recovered, made an order, restraining the lessor of the plaintiff from proceeding in the ejectment, until he should furnish a bill of particulars (with a map annexed), specifying, by metes and bounds, the premises which he sought to recover.

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farm, and occupied the lands jointly, without making any division of the property.

That William Bailie, the then proprietor of the lands of Kilmacardill, by lease bearing date the 15th January, 1795, demised to William Ross one portion of the said farm, by the description of all the farm of land which he the said William then possessed, containing, by estimation, thirteen acres and a half, &c. That by another lease of the same date, the said William Bailie demised to John Ross one other part of the said farm, by the description of all the farm of land he then possessed, containing, by estimation, eight acres, &c. ; and that by a third lease of the same date, he demised to Robert Ross, the lessor of the plaintiff, another part of the said farm, by the description of all the farm of land he then possessed, containing, by estimation, thirteen acres and a half, &c. These leases were for the term of 21 years, or the lives of the respective lessees.

The affidavit further stated, that John Ross died in 1824, and William in 1827 ; and that after the execution of the said leases, and up to the time of their respective deaths, they and Robert, the lessor of the plaintiff, continued to reside together, and to occupy the lands jointly, as they had previously done. That William Bailie was succeeded in his estates by one Theodore Bailie, whose daughters and co-heiresses the present applicants were ; and that as such co-heiresses, they became entitled to the lands of Kilmacardill upon the death of their father. That being minors at the time of their father's death, they were made wards of Chancery, and that a receiver was appointed over their estates, to whom the rents of the said three farms were paid for several years. That upon the deaths of John and William Ross, their respective leases having expired, applications were made to the survivor, Robert, the lessor of the plaintiff, to take the farms of his deceased brothers, which, however, he refused to do.

That in 1832, two ejectment decrees were obtained against the lessor of the plaintiff, one for the recovery of the possession of the premises demised to John, and the other for the recovery of those demised to William Ross. That possession was shortly afterwards taken of the farm so demised to John Ross ; and that possession was also taken of the farm which had been so demised to William Ross, in the following manner, viz., by the bailiff going upon one field, and declaring that he took possession thereof as and for the premises held by William Ross in his lifetime. That various applications had been made to the said Robert Ross to point out the boundaries of the farm which had been so demised to him, and that he had refused to do so.

That in the year 1834, the lessor of the plaintiff brought an action of trespass against the receiver, upon an allegation that, under the decree which had been so obtained for the recovery of the possession of

the lands demised to William Ross, possession had been taken of a part of the lands demised to him the said Robert Ross, but that in this action the jury found a verdict for the defendant.

That a copy of the ejectment in this cause having been served upon the applicants, the deponent was employed to protect their rights; and that he was convinced, from the course pursued by the lessor of the plaintiff in the said action of trespass, his object was fraudulently to get possession, under pretence of the present ejectment, of the best part of the lands so demised to Wm. Ross, inasmuch as the applicants had never disputed the lessor of the plaintiff's title to the lands which had been demised to himself. That a notice was served upon the attorney of the lessor of the plaintiff, requiring him to furnish the deponent with a statement of the metes and bounds of the lands of Kilmacardill mentioned in the ejectment.

Mr. Shail.—The attorney employed by these ladies to take defence to the ejectment, is totally at a loss to know the particular parts of the lands of Kilmacardill which the lessor of the plaintiff seeks to recover by his ejectment; and as the question between the parties is one of part and parcel, the lessor of the plaintiff ought to amend his declaration, so as that the applicants may be enabled to take defence.

There was no appearance for the lessor of the plaintiff.

PENNEFATHER, B.—Perhaps the more convenient course will be, to stay the lessor of the plaintiff's proceedings until he shall furnish a bill of particulars. Therefore,

Let the conditional order be varied, by directing the lessor of the plaintiff to be restrained from proceeding in this ejectment until he shall furnish a bill of particulars, specifying, by metes and bounds, the premises which he seeks to recover; and let him annex a map thereof to the bill of particulars; and, with that variation, let the said conditional order be made absolute.

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Friday, November 22d.

PRACTICE—STAYING PROCEEDINGS—COSTS—TRIAL—
JURY PROCESS—VENIRE FACIAS—DISTRINGAS—
CHALLENGE TO THE ARRAY—POSTEA.

GILLESPIE v. CUMING.

The Court will permit the defendant to enter a rule to stay proceedings, until the costs of not going to trial, pursuant to notice, be paid, where a trial has been lost by the default of the plaintiff, in not delivering the *distringas* to the sheriff in sufficient time to enable him to summon the jurors six days before the assizes.

MR. WHITESIDE (with whom was Mr. Napier) moved that the defendant be at liberty to enter a rule to stay further proceedings in this cause, until the costs of not proceeding to trial, pursuant to notice, be paid by or on behalf of the plaintiff, and for the costs of the motion.

In this case, notice of trial had been served by the plaintiff for the Monaghan Summer Assizes, which commenced on the 31st July, 1839. A writ of *venire facias* was issued in proper time, and duly returned by the sheriff, with the panel containing the names of the jurors thereunto annexed, in the usual manner. Upon the return of the *venire*, a writ of *distringas juratores* was issued in the ordinary course, but the latter writ was not delivered to the sheriff until the 27th of July. Upon the receipt of the *distringas*, the persons named in the panel were summoned by the sheriff to attend the assizes, and a large proportion of them did attend accordingly.

It appeared that no writ of *distringas* had been delivered to the sheriff previously to the assizes, save that in the present case.

The case having been called on, and a jury empanelled, a challenge to the array was taken on the part of the defendant, upon the ground that the jurors had not been summoned six days before the 31st of July, the day fixed for the holding of the assizes. Issue having been joined upon that fact, triers were appointed, who, being duly sworn, found in favor of the challenge; whereupon it was adjudged that the panel should be quashed, and the jurors having been accordingly discharged, the case remained untried.

On a previous day in this Term, an application, grounded upon the *postea* alone, was made before Baron PENNEFATHER, on the part of the defendant, that the Officer should be directed to enter the rule *nisi* for judgment upon the *postea*, or for a rule stopping further proceedings until the costs of the proceedings already had were paid. His Lordship, however, refused to pronounce any rule upon the motion, observing, that the *postea* did not afford sufficient information to enable him to do so; that the issue found for the defendant upon the challenge related rather to the conduct of the sheriff than to that of the plaintiff; that from any thing appearing upon the face of the record itself, the *distringas* might have been delivered to the sheriff in proper time, and that the omission to summon the jury might have proceeded from the default of the she-

riff, and not from the default of the plaintiff; that this was a fact to be ascertained by affidavit.*

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* This case being somewhat novel in practice, the form of the *postea* is here subjoined.

"Afterwards, that is to say, on the day and year, and at the place within mentioned, before the Honorable Charles Burton, one of the Justices of her Majesty's Court of Queen's Bench, and the Honorable Richard Pennefather, one of the Barons of her Majesty's Court of Exchequer in Ireland, Justices of our Lady the Queen, assigned to hold the assizes in and for the county of Monaghan, at Monaghan, in the said county, according to the form of the statute, came as well the within-named William Gillespie as the said Patrick Mathias Cuming, by their attornies within-mentioned, and the jurors of the jury, of which mention is within made, being called, likewise come and are empanelled; whereupon the said Patrick Mathias Cuming challenged the array of the panel aforesaid, because he says that six days before the said thirty-first day of July, in the year last aforesaid, the said jurors, so empanelled as aforesaid, were not, nor was any of them, nor any juror of the county aforesaid, summoned to serve upon the said jury, or on any jury on any cause in the said Court of *Nisi Prius* at the said assizes, for the trial of any issue therein, by virtue or in pursuance of any writ of *venire facias*, *distringas juratores*, or other writ or order in that behalf made or provided. And this the said Patrick Mathias Cuming is ready to verify, whereupon he prayeth judgment, and that the said panel may be quashed.

"And the said William Gillespie, in reply to the said challenge,

"saith, that the said panel ought not to be quashed, because he saith, that the said jurors so empanelled as aforesaid, were summoned to serve upon the said jury in the said Court of *Nisi Prius*, at the said assizes, six days before the said thirty-first day of July, in the year last aforesaid, to wit, at Monaghan aforesaid; and this the said William Gillespie prays may be inquired of by the country, and soforth.

"And the said Patrick Mathias Cuming, as to the said reply of the said William Gillespie to the said challenge of the said Patrick Mathias Cuming, and whereof he prayeth that it may be inquired of by the country, doth the like, and soforth; whereupon Alexander Dudgeon, Esq. and Charles C. Gibson, Esq. then and there present in the Court aforesaid, by consent of the parties aforesaid, and by command of the said Justices, being duly sworn to try the truth of the issue last aforesaid, as the triers thereof, upon their oath find for the said challenge.

"Wherefore it is considered and adjudged by the said Justices, that the said panel be, and the same is thereupon quashed, and the jurors aforesaid discharged from further attendance at the said assizes for the trial of the said issue in the Court aforesaid, and the same thereupon remains untried for want of jurors, as aforesaid."

It is to be observed, that the challenge was framed in such a form as to meet the case of any *distringas* having been delivered and acted upon.

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Affidavits were accordingly made on the part of the defendant, from which it appeared that the *distringas* had not been delivered until the 27th July, which was the day indorsed upon the writ as the date of its receipt by the sub-sheriff. Under these circumstances, the application was again brought forward in its present form, and was now opposed by

Mr. *Gilmore*, Q. C., on behalf of the plaintiff.—The defendant is not entitled to carry this motion. Instead of availing himself of the opportunity of having the case tried, he prefers to have recourse to this technical objection, for the purpose of delay. The plaintiff's attorney has made an affidavit, in which he states, that a jury was in the box, all of whom usually appeared upon the *Nisi Prius* panel of the county of Monaghan, and all of whom were named in the panel annexed to the *venire facias* in this cause. He further states, "that he understood and believed "it to be the practice, when a panel has been once returned by a sheriff "upon a writ of *venire facias*, that the *distringas* may be delivered at any "time before the day of trial."—[PENNEFATHER, B. That is quite a mistaken statement of the practice.]—There is no analogy between this case and one where the plaintiff has not taken down the record for trial, at all, or where he has taken it down at too late a period to admit of its being tried. In either of such cases, the possibility of having a trial is precluded by the default of the plaintiff, whereas a trial might have been had in this case, had it not been for the conduct of the defendant himself in occasioning its postponement. His object was obviously delay, and having so far succeeded in attaining that object, he ought not now to be permitted still further to delay the plaintiff's proceedings, by entering a rule to stay them, until payment of the costs of a failure entirely resulting from his own default.

Originally, when a *remanset* was entered, or when a trial proved abortive, neither party got the costs; but in *Sadler v. Evans* (a), the rule is stated to be, that when a cause remains untried, without any default in either party, the costs of taking the case down to trial are to be paid by the unsuccessful party to the party finally succeeding in the cause. No case can be cited in which the costs of a *remanset* were, under any circumstances, given to the party who failed in the second trial; and if the Court now intended to establish a precedent, and hold, that for the future, when a party makes a slip of this kind, but proves eventually successful, he is not only to lose his costs, but is actually to pay costs to the opposite party, it would only make such an order prospectively; *Sparrow v. Turner* (b).

As to the merits, it is not pretended, in any affidavit made on the part of the defendant, that he has a case upon the merits.*

(a) 4 Burr. 1887.

(b) 2 Wils. 366.

* The Counsel for the defendant were not called upon, but Mr. *Napier* was prepared (if necessary) to have relied upon the case reported in *Sayer's Law of Costs*, 173, as furnishing a principle precisely applicable.

PENNEFATHER, B.—This is an application on behalf of the defendant, for liberty to enter a rule to stay proceedings, until the costs of not bringing down the cause for trial, pursuant to the plaintiff's notice, shall have been paid.

The motion turns upon the question, whether the plaintiff has brought down the record for trial according to the course of the Court. If he has, and if it was without any default on his part, that a trial has not taken place, this rule ought not to be entered; but if, on the other hand, the record was not properly brought down for trial according to the course of the Court, the rule ought to be entered.

The course of proceeding at *Nisi Prius* is this:—The *venire facias* is returned in the first instance; and upon that return, the sheriff annexes a panel to the writ, containing the names of those jurors who are to try the case. The party is entitled to have a full attendance of jurors, and to have a jury selected by ballot from all the jurors who have been summoned. The *distringas* then goes to the sheriff, that he may summon those persons whose names have been returned upon the *venire*, to attend the assizes. If they are not summoned by virtue of the *distringas*, the return of names upon the *venire* is a mere blank piece of parchment, and the jurors are not bound to attend.

Let us see what would be the consequence of holding the course of proceeding pursued by the plaintiff in this case to be a proper one. According to the argument on the part of the plaintiff, a party need not issue a *distringas* in time to have the jury summoned; and thus, some twelve or fourteen of the plaintiff's friends, whose names happen to be upon the panel annexed to the *venire*, having attended the assizes and appeared in the jury box, the defendant (if the argument be well founded) would be bound to go to trial, without having any opportunity afforded him of procuring a fair ballot or of obtaining an impartial selection of the jury. I do not mean to say that any such thing was attempted in the present case, but the question is to be determined upon general principles. The legislature has enacted, that in the case of trials at *Nisi Prius*, the jury are not to be sworn in the order in which they have been entered on the panel by the sheriff; but with the view of preventing partiality and corruption, it provides that they shall be chosen by ballot. Now, this salutary provision of the legislature would be altogether defeated, if the present mode of proceeding were allowed to be adopted.

The *distringas*, in this case, was delivered to the sheriff only three days before the assizes; the law required that it should have been delivered six. The sheriff had not, therefore, an opportunity of summoning the jurors six days before the day on which they were to attend, pursuant to the statute; and accordingly, the triers find, that the jurors were not so summoned, and upon that ground, the challenge to the array is allowed.

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A fair and impartial trial could not be had, if it were left to the plaintiff to select those persons who are to form the jury; and the refusal of this motion would, in effect, be giving the plaintiff the selection of his own jury.

I am aware, that, in practice, it frequently happens that *distringas* are delivered to the sheriff but a very short time before the assizes; but then, in such cases, some one *distringas* having been delivered in time, the sheriff acts upon it, and summons the entire panel. He summons them to attend the assizes generally, the act of parliament enacting that the same panel shall try all the issues at the same assizes. There is, therefore, in such cases, a regular summons of the entire panel, and the jurors are summoned for every case.

But in deciding the present question, it is not necessary to give any opinion as to what the consequence would be of delivering a *distringas* in the manner I have just mentioned, the jurors here not having been summoned in any one case in time.

We, therefore, think, that as there was default on the part of the plaintiff, the motion of the defendant should be granted; but, as that default was not intentional, it must be without costs *

RICHARDS, B. concurred.†

* The following are the provisions of the Jury Act (3 & 4 W. 4, c. 91) referred to by the learned Baron in the course of his judgment:—

Sec. 12.—“And be it further enacted, that every sheriff or other minister to whom the return of juries for the trial of issues before any Court of Assize or *Nisi Prius*, in any county, city, or town of Ireland, may belong, shall, upon his return of every such writ of *venire facias* (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order or rule of Court), annex a panel to the said writ, containing the names, together with the places of abode and additions, of a competent number of jurors named in the jurors' book; and that the names of the same jurors shall be inserted in the panel annexed to every *venire facias* for the trial of all issues at the same assizes or sessions of *Nisi Prius* in such county, city, or town, which number of jurors shall not be less than 36, nor more than 60, unless by the direction of the Judges appointed to hold the assizes or sessions of *Nisi Prius* in the same county, city, or town, or one of them, who are and is hereby empowered, by order, under their or his hands or hand, to direct a greater or lesser number, and then such number as shall be so directed shall be the number to be returned; and such jury so returned shall be competent to try all the issues at that assizes or session of *Nisi Prius*; and that in the writ of *habeas corpora juratorum*, or *distringas* subsequent to such writ of *venire facias*, it shall not be requisite to insert the names of all the jurors contained in such panel, but it shall be sufficient to insert in the mandatory parts of such writs respectively—‘The bodies of the several persons in the panel to this writ annexed named,’ or words of the like import, and to annex to such writs respectively panels containing the same names as were returned in the panel to such *venire facias*, with their places of abode and additions; and that for making

† Baron FOSTER was presiding at *Nisi Prius*.

Monday, Nov. 10th.

PRACTICE—VENUE.

MULVANY v. WHITE.

MR. HANS HAMILTON, for the defendant, moved to change the venue from the city of Dublin to the Queen's County, upon the usual affidavit, which further stated that the plaintiff's witnesses (if any) resided in the Queen's County.

A motion to change the venue, on the usual affidavit, is too late after plea pleaded.

This application was made last Term, but in compliance with a suggestion from the Court, it stood over, in order that the defendant might tender a consent that the venue should be changed. A consent was accordingly tendered, but the plaintiff refused to sign it. The justice of the case requires that the venue should be changed, the action having been brought for a very small sum.

"the returns and panels aforesaid, and annexing the same to the respective writs, the legal fee, and no other, shall be taken; and that the men named in such panel, and no others, shall be summoned to serve on juries at the then next Court of Assizes or session of *Nisi Prius* for the respective counties, cities, and towns named in such writs."

Sec. 18.—"And be it further enacted, that the summons of every man to serve on any jury, common or special, in any of the Courts aforesaid, shall be made by the proper officer six days at least before the day on which the juror is to attend, by shewing to the man to be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing, under the hand of the sheriff, sub-sheriff, or other proper officer, containing the substance of such summons."

Sec. 19.—"And be it further enacted, that the name of each man who shall be summoned and impanelled in any Court of Assize or *Nisi Prius*, with the place of his abode and addition, shall be written on a distinct piece of parchment or card, such pieces of parchment or card being all as nearly as may be of an equal size, and shall be delivered unto the Clerk of the Judge of Assize or *Nisi Prius* who is to try the cause, by the under-sheriff of the county, city, or town, or other officer returning the process, and shall, by direction and care of such clerk, be put together in a box to be provided for that purpose; and when any issue shall be brought on to be tried, such clerk shall in open Court draw out twelve of the said parchments or cards one after another, after having shaken them together; or in cases where any view shall have been directed and had as aforesaid, so many as, together with the viewers who shall appear and be sworn, shall be sufficient to make up the number of twelve; and if any of the men whose names shall be so drawn shall not appear, or shall be challenged and set aside, then such further number until twelve men, or such other number as, together with such viewers so appearing and sworn as aforesaid, shall make up the number of twelve, be drawn, who shall appear, and who, after all just causes of challenge allowed, shall remain as fair and indifferent; and the said twelve men, their names being marked in the panel, and they being sworn, shall be the jury to try the issue," &c.

The section goes on to provide, that where the jury have not brought in their verdict, twelve others are to be drawn. It also provides that the same jury, if consented to by both parties, may try several issues in succession, without being re-drawn.

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Mr. J. D. Fitzgerald, contra.—The plaintiff's attorney has made an affidavit, from which it appears that the cause was at issue before the notice of the motion was given, and, therefore, the application is too late; and as to the special grounds, that the plaintiff's witnesses reside in the Queen's County, the plaintiff's attorney has sworn that he has obtained a direction of proofs from counsel, and that all the witnesses directed to be examined, with one exception, reside in the city of Dublin.

Mr. Hamilton.—The defendant is, at all events, entitled to an undertaking from the plaintiff to give material evidence in the county where the venue is laid. This motion must be considered as if it had been made in the last Term.

PENNEFATHER, B.—Even so, it is too late, it not having been made until after plea pleaded, in fact, until after issue joined. An application to change the venue, upon the common ground of the cause of action arising out of the county in which the venue is laid, is too late after plea pleaded (a); and the only special ground stated in the defendant's affidavit has been fully answered by the affidavit made on the part of the plaintiff. The application must, therefore, be refused.

No rule—the defendant to pay the costs of the motion.

(a) The practice in England is precisely similar—*Vide Smith v. Walker*, 8 Taunt. 169; S. C. 2 Moore, 64; *Wilson v. Harris*, 2 Bos. & Pul. 320. But if the motion to change the venue be made upon special grounds, it would appear that, as a general rule, the proper time to make it is after plea pleaded; *Vide Bank of Ireland v. Stewart*, 2 Law Rec. 2 Ser. 179; *Mathews v. Gregg*, 3 ditto, 276; and *Cotterill v. Dixon*, 1 Crompt. & Mees, 661.

Thursday, November 21st.

SOLDIER—MUTINY ACT—ARREST—DISCHARGE.

POUNDER v. BOOTH.

Upon an application to be discharged under the Mutiny Act, which directs that "no person enlisted as a soldier, or serving as a non-commissioned officer or drummer on the permanent staff of the disembodied Militia, shall be liable to be taken out of H. M. service by any process or execution," unless upon affidavit that the original debt amounts to £30,—it must be clearly and explicitly shewn that the party applying was a soldier "duly enlisted" at the time of the arrest, and that such arrest was "contrary to the intent of the act," the provisions of which are to be construed strictly. Therefore, where a defendant, who claimed exemption from arrest upon the ground of being a sergeant on the permanent staff of a disembodied Militia regiment, applied to be discharged under the above act, the Court refused the application, it not appearing with sufficient certainty from the affidavits, that at the time of the arrest, the applicant was a soldier "duly enlisted," and "serving" on such staff as a non-commissioned officer.

at the plaintiff's suit against the defendant, for the sum of £27. 5s., and for the costs of the application.

The affidavit of the defendant, after stating the arrest, proceeded to state that the deponent "enlisted as a soldier in the Wexford regiment of Militia on or about the 25th day of April, 1810, and that he has ever since continued, except one year and nine months, from 1829 to 1831, and is now, an enlisted soldier in her Majesty's service, and has been for several years past, and was, at the time of such arrest, and now is, a non-commissioned officer, to wit, a sergeant on the permanent staff of the Wexford regiment of Militia; and deponent saith, he verily believes that the plaintiff was well aware of his being such permanent sergeant."

"Saith he is informed and believes, that pursuant to an act of parliament passed in the first year of her present Majesty's reign, entitled, "An act for punishing mutiny and desertion, and for the better payment of the army and their quarters;* that deponent is not liable or subject to arrest upon such marked writ for such sum as aforesaid."

* The act referred to by the affidavit had expired at the time this application was made; but the annual Mutiny Acts contain, in general, a similar provision. That for the present year (the 2 Vict. c. 5, s. 3), enacts, that:—

"No person enlisted as a soldier, or serving as a non-commissioned officer or drummer on the permanent staff of the disembodied Militia, shall be liable to be taken out of her Majesty's service by any process or execution whatsoever, other than for some criminal matter, unless an affidavit shall be made by the plaintiff, or some one on his behalf, for which no fee shall be taken, before some Judge of the Court out of which such process or execution shall issue, or before some person authorised to take affidavits in such Courts (of which affidavit a memorandum shall, without fee, be endorsed upon the back of such process), that the original debt for which the action had been brought or execution sued out amounts to the value of £30 at least, over and above all costs of suit in the

"action or actions on which the same shall be grounded; and any Judge of such Court may examine into any complaints made by a soldier or his superior officer, and by warrant under his hand discharge such soldier without fee, he being sworn to be duly enlisted, and to have been arrested contrary to the intent of this act, and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant in any judgment or execution as aforesaid; provided that any plaintiff, upon notice of the cause of action first given in writing to any soldier or left at his last quarters or place of residence, before such listing, may file a common appearance in any action to be brought for or upon account of any debt whatsoever, and proceed therein to judgment and outlawry, and have execution other than against the body."

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"Saith he is claimed as an enlisted soldier and as such non-commissioned officer of the Wexford regiment of disembodied Militia, by "H. Collins, Esq., Captain and Adjutant of said permanent staff, who "is deponent's superior officer."

An affidavit was also made by Capt. Collins, stating that the defendant had been for more than twenty-one years, and was then, a sergeant on the permanent staff of the Wexford regiment of Militia, and was such sergeant at the time of the arrest, and that the deponent, as the defendant's superior officer, under the provisions of the Mutiny Act, claimed his enlargement from the arrest.

Mr. *L. Nunn*, for the plaintiff, opposed the motion. The section of the statute which is relied on at the other side, requires, that in order to entitle a person belonging to the permanent staff of the Militia to his discharge from arrest, it must be shewn that he was actually *serving* at the time of such arrest; and, therefore, inasmuch as the word "*serving*," which is a word contained in the statute, is wholly omitted from both these affidavits, it does not appear to the Court that the defendant was in such a situation at the time of his arrest, as to entitle him to the extraordinary relief now sought.

Per Curiam.*—The affidavit of a party applying to be discharged from arrest, under the provisions of this act of parliament, ought to be full, and such as to bring the case clearly within the clause relied on. That clause is divided into two branches, the first providing for the case of a person enlisted as a soldier; the second, for that of a person serving as a non-commissioned officer or drummer on the permanent staff of the disbanded Militia. But the Court does not conceive that the present case is within either of these branches. This person was enlisted in 1810, but was discharged in 1829, and it does not appear from his affidavit that he was ever re-enlisted.

It is, however, said, that he is now on the staff of the Militia, but it is no where said that he is *serving* on the staff. The affidavit is, therefore, defective also in that respect, as it ought to have stated that this person was "*serving*" as a non-commissioned officer on the permanent staff of the Militia. In cases like this, the Court must be fully satisfied that there is a *bona-fide* claim of service, as this act of parliament is to be construed strictly.

Motion refused, without costs.

Monday, December 2d.

Amended affidavits were subsequently filed, stating that the defendant had been for more than twenty-one years and was then, "a non-

* PENNEFATHER, B. and RICHARDS, B.

"commissioned officer, to wit, a sergeant serving and receiving pay
"on the permanent staff of the Wexford regiment of Militia, and was
"serving and receiving pay as such sergeant as aforesaid at the time of
"the arrest hereinafter mentioned," &c.

The application having been on this day renewed before BARON PENNEFATHER, in Chamber, his Lordship refused the motion, with costs, upon the ground that it did not appear, with sufficient certainty, from the affidavits, that the defendant was a soldier "duly enlisted" at the time of the arrest.

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Monday, Nov. 11th.

PRACTICE—BILL OF EXCEPTIONS—ERROR—
AMENDMENT.

QUIN v. NATIONAL INSURANCE COMPANY.

THIS was an application on behalf of the defendants, to amend the record, by entering up a verdict for the plaintiff, on the issues joined upon the defendants' first and sixth pleas.

These issues were merely formal, and the question at the trial turned altogether upon the other issues. A bill of exceptions having been taken to the direction of the learned Judge before whom the case was tried, judgment was given for the defendant in this Court (a), and afterwards affirmed in Error, two Judges dissenting. One of the learned Judges who dissented from the majority, PERRIN, J., intimated an opinion that there was error on the record, in consequence of the verdict on the first and sixth issues not having been entered for the plaintiff.

Mr. *Napier*, in Trinity Term, applied to have the verdict so entered, and stated that it was in deference to the opinion of the learned Judge who suggested the defect, that the present application was made; and that as the case might be taken to the House of Lords, it was conceived more prudent to have it free from any formal objection.

Counsel referred to *Richardson v. Mellish* (b), and *Henley v. Mayor*

(a) *Vide* 5 Law Rec. 2 Ser. 267.

(b) 11 B. M. 104; S. C. in Error, 7 B. & C. 819; 2 Moor. & Sc. 191*

Where the verdict of the jury was given upon the substantial issues, and no finding appeared on the record upon two formal issues, the Court allowed the record to be amended, by entering a verdict in conformity with the evidence, as appearing on the bill of exceptions, after writ of error sued out, and judgment pronounced in the Court of Error, and before the return of the transcript.

Such an application must be made in the first instance to the Court below to amend the record, and afterwards to the Court of Error, to amend the transcript.

* In *Richardson v. Mellish*, it would appear that the ground on which it was alleged the right to amend rested, was the English statute of mis-

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of Lyme Regis (a).—[The COURT. Why do you not apply to the Court of Error?—The transcript of the record is sent there from this Court. The record itself must first be amended here; then an application must be made to the Court of Error, to have the transcript amended in conformity with the amended record. The cases cited shew this to be the proper course.

Mr. *Holmes, contra*, contended that the application could not be sustained.

The COURT* said they would look into the cases.

The matter having been again mentioned to the Court on this day,

PENNEFATHER, B. said, that although he could not see the necessity of the application,† the Court conceived that, upon the authorities, it was justified in making the order.

Ordered by the Court, that the said *postea* be amended, by entering up a verdict for the plaintiff on the issues joined upon the defendants' first and sixth pleas in this cause, without further motion.

A similar order was afterwards obtained in the Court of Error, to amend the transcript (b).

(a) 3 Moor. & P. 310.

(b) See the cases of *Tinkler v. Rowland*, 6 Nev. & Man. 848; and *The King v. Johnson*, Robinson's Appeal Cases, 1.

* FOSTER, B., and RICHARDS, B.

† See acc. *Powell v. Sonnett*, 11 B. Moore, 330.

pleadings and jeofails, no other statutable authority being there referred to. It might, however, be a subject deserving consideration, how far the Irish statute of mispleading and jeofails, the 33 *Hen.* 8, sess. 2, c. 3, would warrant such amendments, in cases where bills of exceptions have been taken. The 5th section of that statute provides, that the act, or any thing therein contained, shall not "extend to any "exception or exceptions to be "moved before any Justice or Jus-

"tices, Judge or Judges, and not "allowed by them or any of them, "whereupon a bill thereof shall be "sealed or refused to be sealed, but "the same to stand and be of and "in the same force, effect, condi- "tion, and manner, as it was before "the making and establishment of "this present act, any thing men- "tioned in this act to the contrary "notwithstanding."

It is observable, that the English statute, 32 *Hen.* 8, c. 30, contains no corresponding proviso.

Monday, November 4th.

ELEGIT—INQUISITION—RETURN.

Lessee NERNEY v. WALKER.

THIS was an ejectment on the title, brought for the recovery of the lands of Churchacre, situate in the county of Roscommon. The case was tried before Mr. Sergeant *Greene*, at the Summer Assizes, 1838.

The lessor of the plaintiff claimed upon two grounds:—First, as the assignee of an insolvent, by whom the lands had been held under a lease for lives; and, secondly, as tenant by *elegit*. Having failed in establishing his claim to a verdict for the entire of the lands upon the first ground, he relied upon the second, as entitling him, at all events, to a verdict for a moiety. The sheriff's return to the *elegit* stated that he had delivered a moiety of the lands to the lessor of the plaintiff by "metes and bounds." The defendant objected to the insufficiency of the return, in not specifying the actual metes and bounds of the moiety delivered; and also, that even if the return was sufficient, still it was necessary for the plaintiff to shew, by other evidence, what the metes and bounds were, so that it might be known what particular portion of the lands the lessor of the plaintiff was entitled to. The learned Sergeant, however, overruled the objections, and the plaintiff accordingly obtained a verdict for a moiety of the lands.

A conditional order having been obtained to set aside the verdict, and for a new trial—

Mr. *Monahan*, for the defendant, now moved to make it absolute, and contended that the return was bad, for uncertainty, for the reason above assigned; and referred to the case of *Lessee Coyne v. Bartley* (a), in which the Court of Queen's Bench in this country, deciding in accordance with the English authorities, held a similar return to be insufficient; and further, that even if the inquisition was not void on the face of it, still the plaintiff was bound to shew what the metes and bounds were, so that the sheriff might know what precise lands the plaintiff was entitled to, otherwise the sheriff could not know how to execute the writ; that it was conceded he could not deliver an undivided moiety, and that there were no means of shewing what the divided moiety was.

COURT.—If more than a moiety be delivered, the party has his remedy.

(a) Alc. & Nap. 301.

A return to an *elegit*, stating that the sheriff has delivered a moiety of the lands, by "metes and bounds," held, by this Court to be a sufficient return.

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Mr. *Walter Bourke*, with whom was Mr. *Fitzgibbon*, *contra*, insisted that the form of the return was correct, and in perfect conformity with the practice of this Court, in which it had been uniformly held that such a return was sufficient. It was further insisted, that in many cases, it would be impracticable to make a return in any other form; and the cases of *Prittie v. Butler* (a), *Lessee Sibthorpe & Colles v. Best* (b), *Lessee Munroe v. Tracey* (c), *Lessee Donohue v. Firman* (d), *Roe v. Mahon* (e), were cited.

Mr. *Monahan*, in reply.—Since the case of *Lessee Coyne v. Bartley*, in the Queen's Bench, there is but one case in this Court which can be considered as amounting to a contrary decision. In that case there were two points, the one now under consideration appearing to have undergone but little discussion. Besides, some of the present members of the Court not having been then on the Bench, it is conceived that the defendant is not precluded from again taking the opinion of the Court upon the question.

PENNEFATHER, B.—I quite agree with the Court of Queen's Bench in the opinion expressed by them in *Lessee Coyne v. Bartley*, that this is not a question as to the practice of any particular Court, but as to the certainty required by the law in a return of an extent of lands under an *elegit*. In *Donohue v. Firman*, we were much pressed by the authority of the Queen's Bench case; but notwithstanding that decision, the Court being then full, ruled the point directly the other way, thus abiding by their former decisions. This Court has always held it to be unnecessary that the inquisition should specify the actual metes and bounds; and to that opinion, notwithstanding the change that has taken place in some of its members, it is still determined to adhere, until its decisions shall have been reversed in a Court of Error.

Let the cause shewn against the conditional order be allowed, with costs, and let said conditional order be discharged, and judgment forthwith entered for the lessor of the plaintiff, without further motion.

(a) Vern. & Scriv. 231.

(b) Id. 232, n.

(c) Alc. & Nap. 303, n.

(d) Jones Ex. Rep. 508; S. C. 4 Law Rec. 2 Ser. 97.

(e) 2 Law Rec. 2 Ser. 118.

QUEEN'S BENCH.

Wednesday, May 29th.

WILL—CONSTRUCTION OF—EXECUTORY DEVISE—
ESCHEAT.

TISDALL v. TISDALL and others.

THIS was a case directed by the Lord Chancellor, to obtain the opinion of this Court upon certain questions arising upon the construction of the will of William Tisdall, of Marlborough-street, Dublin, attorney, which bears date the 6th of January, 1816, and whereby, after devising an annuity to his wife, charged on part of his real estate, he devised a portion of that, together with other parts of his real estate, including his house in Marlborough-street, to William Tisdall and his heirs; "but if

"William Tisdall shall die in the lifetime of my wife, or afterwards,

"without issue, or heirs male lawfully begotten, living at his death, or,

"if living, who shall happen to die before they attain twenty-one, then

"I devise my estate and interest therein to Philip Tisdall; and further,

"after my wife's death, I devise to the said Philip Tisdall and his heirs,

"my fee-simple estate in Drogheda, and freehold property in Dunleary,

"but if Philip shall die without heirs male lawfully begotten in the life-

"time of William, then I devise such my estates so devised to Philip,

"to William and his heirs; and if William and Philip shall die without

"such heirs as herein already mentioned, then, after the death of the

"survivor of them, I devise my said estates to my sisters, Sidney (the

"plaintiff) and Alicia Tisdall and their heirs." Then followed other bequests, and a residuary devise of all the rest of his real and personal property to William.

The testator shortly after died without lawful issue, leaving Sidney and Alice Tisdall his co-heiresses-at-law; Alice soon after died unmarried.

"and his heirs my fee-simple estate in D. and my freehold in D.; but if P. T. shall die without heirs male lawfully begotten in the lifetime of W. T., then I devise such my estates so devised to P. T. to W. T. and his heirs; and if W. T. shall die without such heirs as herein already mentioned, then, after the death of the survivor of them, I devise my said estates to my sisters S. and A. T. and their heirs;" *Held*, that W. and P. T., in the original devises to them, took estates in fee or *quasi* fee, subject to executory devises over; *Held also*, that W. T. having died in the lifetime of P. T. without leaving issue male, P. T. took in the estates devised to W. T. an estate in fee or *quasi* fee, subject to an executory devise over. *Held also*, that S. T. having survived A. T., who died in the lifetime of P. T. unmarried and without issue, the said S. T. took in all the premises devised an estate in fee or *quasi* fee, by way of executory devise.

Leases for lives do not escheat to the Crown.—*Seemle*.

Where the testator, after devising an annuity to his wife, charged on part of his real estate, devises a portion of that, together with other parts of his real estate, to W. T. and his heirs, "but if W. T. shall die in the lifetime of my wife, or afterwards without issue or heirs male lawfully begotten, living at his death, or, if living, who shall happen to die before they attain 21, then I devise my estate and interest therein to P. T.; and further, after my wife's death, I devise to the said P. T.

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William and Philip, the devisees, were illegitimate sons of the testator, and both died without issue, William in 1831, and Philip in 1837. The latter made leases for long terms to the defendant Peter Kelly, and the object of the plaintiff's suit was to obtain the estates of the testator discharged of those leases, and also of dower which the widow of Philip claimed; but the question of dower was amicably arranged, and not argued. The house in Marlborough-street was held under a lease for lives renewable for ever. Philip obtained a renewal, as devisee, to hold to him and his heirs for lives still in being. His widow was his administratrix.

Mr. *Hans Henry Hamilton*, for the plaintiff.—The questions to be first considered are, what estates did William, and Philip and the plaintiff take, in the various events provided for by the will? The plaintiff contends that William and Philip each took estates in fee or *quasi* fee in the property originally devised to them, subject to an executory devise over to the other in certain events, and also subject to an executory devise over to the plaintiff and her sister, in fee or *quasi* fee, upon the death of the survivor of William and Philip, without issue male of either of them then living. The defendant P. Kelly contends, that William and Philip took estates in tail male, with contingent remainders over, in the events specified by the will. If the latter be the construction of the will, the lease made by Philip to P. Kelly, of 31st of August, 1835, will be valid, as the premises in Dunleary are held under a lease of lives renewable for ever, and the lease would bar the entail, at least so as to uphold it; but as there was no deed executed so as to bar the entail of the fee-simple estates, the leases made of them determined on Philip's death, as they are not warranted by 10 *Car.* 1, st. 3, c. 6, Irish. If the plaintiff's construction be the true one, all the leases are alike determined.

The devise to William gives him the fee in express terms, with an executory devise over, accurately worded, so as to take effect precisely within the limit prescribed by law, but at the most extended period permitted for such estates. It is similar to one of the instances given in *Fearne on Remainders*, 395–6; and the case there cited (which never has been shaken) establishes this position. *Pells v. Brown* (a). The devise to Philip, though not in terms a fee, must be construed to be such, for the words "my estate and interest" carry the whole, without words of inheritance, and do not merely pass a life estate to him. *Cole v. Rawlinson* (b). Besides, it is coupled with a subsequent devise in fee to him. Then follows a devise over, which according to the same authority, *Pells v. Brown*, is an executory devise, to take effect on the failure of issue male of Philip in the lifetime of William. Had the

(a) Crok. Jac. 590.

(b) 1 Salk. 234.

will stopped here, no doubt could be entertained that such would be its construction. It is vitally important to ascertain the effect of these primary devises, as, if they pass the fee with executory devises over, every subsequent limitation must be executory. *Fearne*, 503. The case of *Glover v. Moncton* (a) is an instance of this rule, in which the subsequent devise, taken alone, would have been an estate tail; but it took its character from the preceding devise. Nothing in the subsequent part of the will requires a different construction.—[CRAMPTON, J. What is the event upon which plaintiff is to take?—The devise over to plaintiff and her sister is to take effect immediately upon the death of the survivor of William and Philip, without issue male of either living at that period, or it may be construed to take effect according as William or Philip happened to be the survivor, *reddendo singula singulis*, upon the events mentioned in the will, as those upon which the estates originally devised to them should go over. Each construction is within the legal limit, and the events have happened, as both are dead without ever having had issue male. It is true, that the latter clause does not expressly require the devise over to take effect (if at all) immediately upon the death of the survivor; but by reference to the previous accurately defined legal periods, the clause does it inferentially. The phrase "such heirs" refers to the previous limitations: the testator, having provided for the failure of heirs male of each during the lifetime of the other, now provided for such failure at the death of the survivor. The strict legal meaning of "dying without issue," or "dying without leaving issue," in order to further the intention of a testator, has been always restrained by any slight circumstance, to a failure of issue at the death of the first taker. Here the testator had in view a failure of issue male at the time of the death of the survivor, and not an indefinitely remote failure of issue. In the former parts of the will, the failure of issue is restricted to a definite legal period, and the testator cannot be presumed to have changed the plan of his will, and, having always before had in view a failure of issue at a restricted period, now, for the first time, to mean a failure of issue indefinitely remote. In *Doe dem. Smith v. Webber* (b), *Roe dem. Sheers v. Jeffery* (c), and *Robinson v. Gray* (d), the restricted meaning was put on these words. Where an estate of inheritance, and not an estate for life, is given in the first instance, the Courts are said to incline to the construction of a fee with an executory devise over. 2 *Powell on Dev.* 582. Restrictive words are sometimes implied, where the whole context of the will seems to require it. *Ellicombe v. Gompertz* (e), *Mitchell v. Coulson* (f). The word "heirs" cannot receive two different

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(a) 3 Bing. 13.

(c) 7 T. R. 589.

(e) 3 Myl. & Cr. 150, 154.

(b) 1 B. & Al. 713.

(d) 9 East, 1.

(f) 1 H. & B. 210.

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senses in different parts of the same will, relating to property of the same nature. *Goodright v. Dunham* (a). This rule in no way infringes upon the rule in *Forth v. Chapman*, where the nature of the estate was different. If the testator wished to create estates tail, being an attorney, he was well acquainted with the technical words to be used for that purpose. It is endeavored to cut down the estates given to William and Philip, by intendment, to estates tail male, in consequence of their illegitimacy, so that they could have no heirs general but their own issue, and thus to bring this will within the authority of the class of cases referred to in *Fearne*, 419, 420, c. 2, s. 2. It is sufficient answer to say, that they might have a long line of female heirs; therefore, the devise to them and their heirs cannot be cut down by intendment to an estate in tail male. Besides, here neither William or Philip could be heir to the other; and such an intendment is made only where the devise over is to the heir of the first devisee. *Fearne*, 466-7-8. *Tilbury v. Barbut* (b), *Doe v. Wetton* (c). In this case, Lord Eldon disregarded the circumstance of the devise over being to the next heir of the first devisee, and construed the estate given to be a fee, with an executory devise over.

There is another question for the opinion of the Court, whether, by reason of the death of Philip, without heirs, the renewal which he obtained of the house in Marlborough-street to him and his heirs, is now vested in his administratrix, by force of the statute 7 W. 3, c. 12, s. 9, Irish? As a special occupant was named in the renewal, the plaintiff submits that it is not within that statute, nor was Philip the owner of the entire interest in that lease, but only took the renewal as devisee. His interest determined with his life; and it could not be the intention of the statute to transfer the entire interest in it (which did not belong to him) to his personal representative, to be assets in her hands. Neither can the Crown claim it by escheat, which is a fruit of tenure; and when the tenure is determined, the land reverts to the grantor. 2 Bl. Com. 72, 243. Escheat and forfeiture are quite distinct. Every species of estate is liable to forfeiture, but escheat only operates on lands of inheritance, such being held of the Crown. In a lease for lives, the estate of the grantor is interposed between the tenant's interest and the Crown, from whom the landlord may hold, but the tenant does not. Co. Litt. sec. 4, 13.

Mr. Gayer, for the defendant Peter Kelly.—As to the question respecting the renewed lease, the estate must vest in the administratrix of Philip, as in the very words of the statute of frauds there is no

(a) Doug. R. 268.

(b) 1 Ves. sen. 89, and 3 Atk. 617.

(c) 2 Bos. & Pull. 324.

special occupant; one is named in the lease but none exists; it is the case provided for by the statute, and is, therefore, assets for payment of debts; some were due to my client by Philip at the time of his death. This is in fact a new lease to Philip, the lives in the former lease being all dead. The object of the act was to benefit creditors. It is a rule perfectly well established, that where estates can be construed to take effect by way of remainder, they shall not be held to take effect by way of executory devise. I am far from thinking that this will was clearly or accurately expressed; on the contrary, I think it extremely confused, and although called upon by the Court to do so, the plaintiff's counsel has not been able to decide upon the exact construction he would give to the latter clause upon which the question now arises, but offers a choice between two different constructions. Should either of them be adopted, incongruities will appear, which were obviously contrary to the intention of the testator. Put the case of William's having no male issue, but only a daughter; Philip survives him, and dies leaving an infant son and daughter: should the infant son die, the daughter of Philip would, on the plaintiff's construction, take the whole both of the estates of William and Philip, to the exclusion of William's daughter. Neither William nor Philip could bar the devises over, and in such events a preference would be given to the daughter of Philip, even to the extent of taking William's estate, contrary to the manifest intention of the testator. On behalf of the defendant, we contend that the testator, being well aware of the illegitimacy of his sons, intended them each to take only estates tail, though he devised to them and their heirs. He well knew they could have no heirs but such as sprung from themselves, and the limitations over in default of issue male shews this was the object he had in view. 1 *Powell on Dev. by Jarman*, 179, 180, favors this construction. The testator obviously meant by heirs of his sons, heirs of their bodies. This renders the whole set of limitations consistent, and the devises over would take effect by way of contingent remainder. In *Walter v. Drew* (a) the devise was held to be a remainder, although the words were "after the death of his said son," which is the phrase used in this will.

Tuesday, November 5th.

Mr. Brooke, Q. C.—In the first devise to Tisdall, it makes no difference that the word "heirs" does not occur, as the words "my estate and interest" will carry the fee; the premises in Dunleary he devises to "Philip and his heirs," so that the same construction must be put upon these two clauses; and then the third clause is, "if William and Philip shall die without such heirs," &c., to my sisters; to which clause

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(a) Com. Rep. 372.

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my argument chiefly applies, and the survivor of whom now claims. The words "in the lifetime of William" cannot refer to "begotten," but means if Philip shall die without heirs. In the third clause, the question is, what is intended by the words, "such heirs?" By the general rule you must refer "such" to the next antecedent, which are the heirs of William, and there is no reason for departing from that rule in the present instance; and by the rule *reddendo singula singulis*, the case cannot go beyond this, "heirs male of the body of William." And in respect to Philip, from the clause "if William and Philip shall die without heirs," &c., the Court may gather the intention of the testator; which was to give cross remainders in tail male, in order that as long as there were heirs male of William or Philip, the sisters should not take; and it is also clear, that Sidney and Alice were to take before the daughters of the sons. The construction contended for would utterly defeat this intention. First, as to Dunleary, if Philip died without sons the estate might escheat to the Crown, unless he died in the lifetime of William, for if William left a son the sisters could not take. Secondly, in the event of William dying leaving a son, who afterwards attains twenty-one, and dies in the lifetime of Philip, William's interest in Marlborough-street would escheat, for Philip would not take because William left a son, and the sisters could not take because Philip was living. Thirdly, suppose Philip died leaving one son, and William dies without leaving any child, Philip's son has all and dies an infant, the estates would escheat, because Sidney and Alice could not take, as they can only take upon the contingency of no son. Therefore, the only case which can arise is in the event of these two persons dying without a son. Could the sisters take? The word "heirs" may be cut down to heirs of the body; 1 *Powell on Devises*, by Jarman, 179, 180; and in *Fearne on Remainders*, 406, this rule is given, and all the cases upon the subject are collected. Mr. Jarman, in his edition of *Powell on Devises*, 180, states it as his opinion, that this rule extends to denizens and bastards, and the same is laid down in the report of *Webb v. Herring* (a); and the same principle is laid down in 6 *Bac. Ab.* 7th Ed. T. Remainder, Letter D. 714. The facts of the present case shew the testator only meant the lineal heirs of his sons. Under a devise to A. and his heirs for ever, and if he dies without issue, then to his right heirs, A. takes an estate tail; so laid down in *Brice v. Smith* (b), where all the cases are collected establishing the same principle; and this applies to the first and second clause, because the word "issue" is in the first, and the words "heirs male, lawfully begotten," in the second. The next principle is, that no limitation shall be construed an executory devise, when it can be construed a contingent remainder. *Fearne on Re-*

(a) Bulst Pt. 3, 192. S. C. 1 Roll R. 436.

(b) Wills, R. 1.

mainders, 386, 395. and in *Goodtitle v. Billington* (a); Lord Mansfield, and in *Doe v. Morgan* (b), Lord Kenyon, laid down the same rule. There is an exception to the rule laid down by Lord Kenyon in *Pells v. Brown* (c) and the whole question is, whether the Court will bring our case within the exception. If the case of *Pells v. Brown* directly applies it ought certainly to govern this case; but in Jarman's note, 1 *Powell on Devises*, 188, the opinion of the profession as to this case is stated, and it shews the Court will not introduce that principle when it destroys the obvious intent of the testator; and it also proves how anxiously the Court will construe a devise a contingent remainder instead of an executory devise. Upon the latter point the Court of Queen's Bench held that a change of circumstances was sufficient to alter an executory devise into a contingent remainder; *Doe v. Howell* (d). As to the words "after the death," in respect to personalty, these words have been held to mean, immediately after the death; but when used in reference to real estates, the Court will not in general put the restricted construction on them, 2 *Powell* 572, *Walter v. Drew* (e). Even the rule as to personalty has been called in question by Sir William Grant, in *Donne v. Denny* (f), and in *Doe v. Frost* (g), Holroyd, J., laid stress upon the words "on the decease of the said William Frost." I, therefore, submit that upon the third clause, the Court must imply cross remainder in tail male, between the brothers; Marborough-street and Thomas-street having become vested in Philip, the executory devise is spent, and he took an estate tail; and by the second clause, as Philip did not die in the lifetime of William, and William died without issue, the sisters could not take. Considering the intent of the testator, cross remainders must be implied, and if the Court does not make an estate tail in the second clause, it will altogether defeat the devise in the third clause.

The *Attorney-General* (with whom was Mr. *J. R. Corballis*) declined to take any part in the argument, considering that the rights of the Crown were not involved in the case.

Mr. *Smith*, Q. C.—The decision of *Pells v. Brown* has been followed up by a number of cases, collected in 6 *Cruise's Dig*, 4 ed., 367. The cases of *Anon.* (h), *Hoe v. Gerils* (i), cited in *Pells v. Brown*, *Right v. Day* (k), *Goodtitle v. Wood* (l), *Heath v. Heath* (m), *Doe v. Wetton* (n), establish, that where there is a limitation to a person and his heirs, and not an indefinite failure of issue, but within the rule of perpetuities, as

(a) 2 Doug. 753.

(c) Cr. Jac. 590.

(e) Com. R. 372.

(g) 3 B. & Ald. 546.

(i) Palm. 136.

(l) Wills. 211.

(b) 3 T. R. 763.

(d) 10 B. & C. 191.

(f) 19 Ves. 545.

(h) Dyer 127. a.

(k) 16 East 67.

(m) 1 Bro. C. C. 147.

(n) 2 Bos. & P. 324.

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in this case, living at the time of his death, the devise in fee is not restrained to an estate tail. *Pells v. Brown*, and all the cases, sustain our view, that where the fee is given, and then a limitation over, to take effect within the rule as to perpetuities, that then it takes effect as an executory devise, and not as a contingent remainder. *Doe v. Lawton* (a); and in *Andrew v. Southhouse* (b), it was held, that "all other my interest of and in my estates" carry the fee. If an estate be given to A. and his issue, and if he die without issue over, A. takes an estate tail; but if it be given to A. and his issue, at his death, or under twenty-one, that would create an executory devise. *Green v. Ward* (c). William took an estate in fee, with an executory devise over, and Philip took also an estate in fee, subject to an executory devise over. The cases already cited prove that Philip took in the premises originally devised to him an estate in fee, because it comes within the rule as to a devise to a man and his heirs living, a particular person, and it is not to be cut down to an estate tail. The construction upon the other side would defeat the plain intention of the testator. They say the first estate given to William was an estate in tail male; therefore, if William died, having a son who attained twenty-one, and died, leaving a daughter, she could not take, and this where the devise is to her grandfather and his heirs. The cases cited by Mr. Brooke, as to the Courts preferring contingent remainders to executory devises, do not apply, where the first estates are estates in fee. As to the words, "such heirs," in the third clause, if we are right as to the limitations to William and Philip, these words mean, dying without issue male at the death of the survivor; and the question is, whether the devise was to take effect upon the failure of issue indefinitely? Previous to the recent statute 1 Vict. c. 26 (amending the laws with respect to wills), the principle was, as to real and freehold estate, that "dying without issue" would give an estate tail; the words dying without issue meaning without heirs of the body indefinitely. Also, if you devise personal estate to A., and in failure of issue then over, that gives the property absolutely to A.; but that principle does not apply where the previous estate was an estate in fee. 2 *Powell on Dev.* 582. There are several cases which support this principle. In *Porter v. Bradley* (d), the Court fastened upon the words "leaving no issue behind him." In *Roe v. Jeffrey* (e), the Court said the rule was settled in *Pells v. Brown*; and it establishes this also, that the Court are to engraph the words "such heirs" into the limitations in the previous clauses. In *Radford v. Radford* (f), Lord Langdale says, that the limitation to the survivor of the devisees, in case either of them should die without leaving issue, was a good limi-

(a) 4 Bing. N. C. 455.

(c) 1 Russ. 264.

(e) 7 T. R. 589.

(b) 5 T. R. 292.

(d) 3 T. R. 143.

(f) 1 Keene, 486.

tations. In that case, the Court actually put in the words "as aforesaid," in order to connect the subsequent with the previous limitations, whereas, in the present case, we have the words "already-mentioned."

There is a distinction in the limitation to Philip, which makes his estate go over to William differently from that which makes William's go over to Philip. In *Wilkinson v. South* (a), *Sheppard v. Lessingham* (b), and *Macnamara v. Whitworth* (c), the limitations were held not to be too remote, and the words in the last case would have been indefinite, unless coupled with the words "as before," which necessarily introduces the limitations in the previous part of the will; and in the case of *Right v. Day* (d), the words, "leaving no issue," without words of reference, were held to give the fee, with an executory devise over. The words, "such heirs," therefore, must be referred to the previous limitations, and *reddendo singula singulis*, the limitations in the first clause be introduced into the last. The question as to the second lease depends upon the question, whether Philip took an estate in fee or in tail?

The following certificate was afterwards sent to the Court of Chancery.

This case has been argued before us by counsel, we have considered it, and are of opinion—First, that William Tisdall, the devisee, took in the premises originally devised to him, an estate in fee or *quasi* fee, subject to an executory devise over. Secondly, that the said William Tisdall having died in the lifetime of Philip Tisdall, the devisee, without leaving issue (male) living at his death, or born in due time after the said Philip Tisdall took in the said last mentioned premises, an estate in fee or *quasi* fee, subject to an executory devise over. Thirdly, that the said William and Philip Tisdall having both died without (male) issue living at the time of their respective deaths, or born in due time after, and Sidney Tisdall having survived her sister Alice Tisdall, who died in the lifetime of Philip Tisdall unmarried and without issue, the said Sidney Tisdall, upon the death of the said Philip, in the year 1837, took in the last mentioned premises an estate in fee or *quasi* fee. Fourthly, that Philip Tisdall the devisee, took in the premises originally devised to him, an estate in fee or *quasi* fee subject to an executory devise over. Fifthly, that the said Philip Tisdall having survived the said William Tisdall, and both having died without leaving issue (male) living at the time of their respective deaths, or born within due time after, and the said Alice Tisdall having previously died unmarried, and without issue, the said Sidney Tisdall took in the said premises, an estate in fee or *quasi* fee. Sixthly, that all the estates limited over the original

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(a) 7. T. R. 555.

(b) Ambl. 122.

(c) G. Coop. F. E. 241.

(d) 16 East. 67.

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devises to William and Philip Tisdall took effect, by way of executory devise. Seventhly, that the leases executed by Philip Tisdall, bearing date respectively the 20th March, 1834, and 31st August, 1835, are not, nor is either of them valid against the said Sidney Tisdall. We further certify, that the 8th 9th and 10th questions submitted to us, not having been argued before us by counsel, but counsel having declined to argue the same, we forbear from giving any opinion upon these questions.*

CHARLES BUSHE.

CHARLES BURTON.

P. C. CRAMPTON.

L. PERRIN.

* These three questions related to the questions as to dower assets and escheat, which were withdrawn from the consideration of the Court.

Monday, Nov. 18th.

CRIMINAL LAW—JUDGMENT RESPITED—JURISDICTION
 OF SUBSEQUENT JUDGE OF ASSIZE—JURISDICTION
 OF THIS COURT.

The QUEEN v. CHARLETON.*

A. was indicted at the Assizes of Monaghan, for bigamy, and a verdict of guilty recorded, subject to certain objections taken to the evidence by the defendant's counsel, and which were reserved for the consideration of the Judges. No judgment was pronounced. The majority of the Judges having subsequently decided against the objections, at the following Assizes counsel for the Crown called upon the Judge, who was then presiding in the Criminal Court, to pronounce judgment upon the prisoner, which he declined to do, upon the ground that the punishment being discretionary, he had not jurisdiction. The proceedings were then removed by *certiorari* into the Court of Queen's Bench, when it was *Held*, that the next going Judge of Assize has jurisdiction, in such cases, to pronounce judgment. *Held also*, that this Court has an inherent jurisdiction to do so in cases in which, in the exercise of its discretion, it deems it advisable to do so.

MOTION in arrest of judgment. In this case, it appeared that the prisoner was convicted of bigamy before *Thomas M'Donnell, Q.C.*, at the Monaghan Spring Assizes, 1839. The indictment was founded on the 10 G. 4, c. 34, s. 26,† and a verdict of guilty was returned by the jury, but no sentence

(u) See report of the trial at the Assizes, 1 Craf. & Dix. Circuit Cases, 315.

† 10 Car. 1, sess. 2, c. 14, s. 5, enacts, "That in all cases where any person or persons heretofore have been or hereafter shall be found guilty of any manner of treason, murder, manslaughter, rape, or other felony whatsoever, for the which judgment of death

"should or may ensue, and shall be reprieved to prison, without judgment at that time being given against him, her, or them so found guilty, that all and every person or persons that at any time hereafter, shall by the King's commission be assigned Justice or

was passed, in order to take the opinion of the Twelve Judges upon an objection taken to the evidence of the first marriage. A majority of the Judges thought the evidence sufficient, two holding an opposite opinion; and, at the following Summer Assizes, the prisoner was brought up before PENNEFATHER, B., and counsel on behalf of the Crown prayed for the sentence of the Court, but the learned Judge thought he had no jurisdiction to pass sentence; that the Judge before whom the case was tried should have recorded the sentence, but suspended its execution, because there was a discretion in the amount of punish-

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"Justices, to deliver the gaole
"where any such person or persons
"found guiltie shall remaine, shall
"have full power and authority to
"give judgment of death against
"such person or persons so found
"guilty and reprieved, as the same
"Justice or Justices (before whom
"such person or persons was or
"were found guiltie) might have
"done, if their commission of gaole
"delivery had remained and conti-
"nued in full force and strength."

6th section.—"And be it also en-
"acted by the authority aforesaid,
"that in all cases where any person
"or persons heretofore have been,
"or hereafter shall be adjudged
"and condemned of any man-
"ner of treason, or felony what-
"soever, and shall be reprieved,
"or the execution respited for
"any cause whatsoever, that every
"person or persons which at any
"time hereafter shall, by the King's
"commission, be assigned Justice
"or Justices, to deliver the gaole
"where any such person or persons
"adjudged and condemned as afore-
"said shall remaine not executed,
"shall have full power and autho-
"rity to award execution upon
"every such judgment against
"every such person or persons ad-
"judged and condemned as afore-
"said, in as large and ample man-
"ner and form, to all intents, con-
"structions, and purposes as the
"same Justice or Justices by whom
"such judgment was given might
"have done (if no cause had to
"him or them appeared for the

"stay, respiting, or deferring of the
"execution), and as if his or their
"commission of gaole-delivery had
"remained and continued in full
"force and strength. And over
"that, that no manner of processe,
"or suite made, sued or had before
"any Justices of Assize, gaole deli-
"very, oyer and terminer, Justices of
"peace, or other of the King's com-
"missioners, shall in anywise be
"discontinued by the making and
"publishing of a new commission
"or association, or by altering of
"the names of the Justices of As-
"sises, gaole-delivery, oyer and ter-
"miner, Justices of peace, or other
"the King's commissioners; but
"that the new Justices of Assize,
"gaole-delivery, and of the peace,
"and other commissioners, may
"proceed in every behalfe, as if the
"old commissions and Justices and
"commissioners had still remained
"and continued not altered."

10 G. 4, cap. 34, sec. 26, enacts,
"That if any person, being mar-
"ried, shall marry any other per-
"son during the life of the for-
"mer husband or wife, whether the
"second marriage shall have taken
"place in Ireland or elsewhere,
"every such offender shall be guilty
"of felony, and being convicted
"thereof, shall be liable to be trans-
"ported beyond the sea for the
"term of seven years, or to be im-
"prisoned, with or without hard
"labour, in the common gaol, &c.,
"for any term not exceeding two
"years."

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ment. The proceedings were then removed into this Court by *certiorari*, and the prisoner having been called upon, answered to his name, when the *Attorney-General* moved that he might be remanded to Monaghan, to be sentenced, or that he should be then sentenced in this Court.

Mr. *Napier* moved in arrest of judgment. Wherever the sentence is discretionary, it can only be passed by the Judge who tries the case, for he alone can award the appropriate punishment. The principle upon which this rests is a most reasonable one: for whatever Court awards the punishment should be acquainted with all the circumstances of the case; and if this were not so, a party might always be deprived of the benefit of a discretion in his favor. The 10 *Car.* 1, sess. 2, c. 14, enables any Judge at a commission of gaol delivery to pass sentence of death where there has been judgment before a former Judge, and a reprieve of the execution. But this only extends to capital felonies; and it was so held, after argument, by Baron PENNEFATHER; and there is a similar decision under 9 *G.* 4, c. 54, s. 9, *Rex v. Whelan* (a). The jurisdiction of this Court, at common law, to pass sentence on a conviction from an inferior Court, is only where the punishment is specific. In *Rex v. Baker* (b), the proceedings were removed into the Queen's Bench before judgment, by *certiorari*, and motion for judgment opposed, because this Court never gives judgment upon a conviction in another Court; and in *Rex v. Nicolls* (c), which was a similar proceeding, the same objection was taken as to the *certiorari* being brought before judgment; and it is stated, "but then a doubt arose what the Court could do, the *certiorari* being brought before judgment; and this Court, not being apprised of the circumstances of the offence, could not tell what judgment to give: and in *Carthrew*, 6, it is said they cannot give judgment," and the rule for quashing the *certiorari* was made absolute. The rule in the *King v. Baker* should be qualified to this extent, that the Queen's Bench may pass sentence, if the punishment is specific, and not discretionary. At common law, the issuing of the new commission extinguished the old commission, and every thing commenced under the old commission and not completed, ceased and determined. 2 *Inst.* 419. In *Rex v. Kenworthy* (d), Lord Tenterden said, "There is no doubt that, at common law, where the punishment is not discretionary, the record of an inferior Court may be removed into this Court, and we may pronounce judgment, but in this instance we cannot do so;" and upon these authorities, it is manifest that this Court cannot now pass a discretionary sentence.

(a) Hayes Cr. Law, 586, note (a).

(b) *Carthrew*, 6.

(c) 2 Str. 1227; S. C. 13 Ea t, 412, note. (d) 1 B. & C. 711; S. C. 3 Dow & Ry. 173.

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The *Attorney General*.—Mr. *Napier* has contended that this Court has not jurisdiction, at common law, to pronounce sentence where the trial has taken place under a commission of gaol delivery, or any other determinate jurisdiction. In 2 *Hale P. C.* c. 56, 401, it is stated, "If A. be indicted of felony before justices of the peace, *oyer* or *terminer*, "or gaol delivery, and be convicted by verdict or confession, if the record of the conviction be removed into the King's Bench by *certiorari*, "and the prisoner also be removed thither by *habeas corpus*, that Court "may give judgment upon that conviction." So matters stood until the passing 11 *Hen. 6.* c. 6, and 1 *Ed. 6.* c. 7, the former of which applied only to Justices of the peace. The English act, 1 *Ed. 6.* is the same as the 10 *Car. 1.* sess. 2, c. 14.—[BURTON, J. Is there not something in the previous parts of the 6th section as to execution, which Baron PENNEFATHER held to apply to capital cases?—It is singular that the 1 *Ed. 6.* does not contain one word as to execution, and yet, Lord Hale mentions that that can be done under it, because the second commissioners may act "in every behalf." Judgments are frequently res-pited in England, in order to have the opinion of the Judges taken upon points reserved; and it is so stated in almost every case in *Russell & Ryan's C. C.*; and in *Rex v. Bourne (a)*, the power of this Court, either to remit the case to the Court below for judgment, or pronounce the proper judgment itself, when proceedings are removed into it by *certiorari* before judgment is distinctly laid down; and Patteson, J., adds, "As to the argument, that this Court cannot interfere, because the punishment is discretionary, I think it is far best to proceed by a broad rule, and to say that the discretion makes no difference." The first question in this case is, whether this Court can pronounce sentence; and secondly, whether it will do so? It was the ancient jurisdiction of this Court, even where the punishment was discretionary. It is so laid down in *Dallison's R.* 25. As to the general effect and operation of the act of *Ed. 6.* there is not to be found a single case removed from the Court below by *certiorari* to the Queen's Bench, the course appearing to have been, invariably, to pass the sentence at the following assizes. That statute continues the proceedings, where indictments found and pleas pleaded; and if all these proceedings are continued, why not also up to judgment? "The King's Judges may give judgment in every case." 2 *Hawk. Pl. C.* 7, s. 6; 1 *Chitty's Cr. Law*, 698; and if that be so, the Court will have to consider whether the act of *Ed. 6.* has taken that jurisdiction from this Court, by implication, which it has not certainly done expressly. The cases cited merely go to this, that this Court will not pass sentence, except where there is some urgent

(a) 7 Ad. & E. 57.

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necessity, but will leave it to the Court below to do so. In *Regina v. Porter* (a), a *certiorari* to remove an indictment after conviction and before judgment, was resisted, upon the ground that the punishment being a fine, was discretionary; but the Court distinctly stated that it had jurisdiction to award the *certiorari* in such cases, and also mentioned a case in which it was done, where the indictment was for words, and there are no cases in which the punishment is more discretionary than in these. In a note to the *King v. Baker* (b), it is noticed, that according to the report of *Nicoll's Case*, in *2 Strange*, the defendant was allowed waive a plea of guilty, which is manifestly so untenable a statement, that no reliance can be placed upon the decision. The case of *Rex v. Garside* (c) was not decided. The sentence was respited, upon the ground that the Judge of Assize could not pronounce the sentence, but because the Court gives little encouragement to the bringing of cases before it which could be disposed of below. In *Rex v. the Inhabitants of Upper Papworth* (d), the only question discussed was, whether the Court could apportion the fine, from the terms of the act under which it was imposed, but the general jurisdiction of the Court was not disputed. Upon these authorities, it is manifest that the inherent jurisdiction of this Court remains, and that it has the power to pronounce the sentence, if, in its discretion, it should be satisfied that this is a proper case in which to exercise it.—[BURTON, J. The doubt of the Judge may have arisen from his not knowing what punishment he ought to inflict.]—That difficulty must be met in some way. One mode is, by conference with the Judge who tried the case. In *Rex v. Hartley* (e), reserved for the consideration of the Judges, Le Blanc, the subsequent Judge, pronounced the sentence upon him. In *Rex v. Boyce* (f), the defendant's identity alone was in question, and there was then no doubt, that if the jury found against him, this Court would pronounce judgment upon him. As to *Rex v. Kenworthy*, it has something for every side. In *Rex v. Bourne* (g), the Court founded their decision upon the case of *Rex v. Ellis* (h), and held that an erroneous judgment having been pronounced, the Court had no power to sent it back to be amended; but it seemed to be generally admitted the Court could do so, if no judgment at all had been given. In *Rex v. Little* (i), the case was reserved, and the Court held that the conviction was right, "and that judgment should be passed upon the prisoner." Upon all these grounds, we submit that, at common law, this Court has an inherent jurisdiction to pass sentence in all cases where none has been previously passed.

(a) 1 Salk. 149; S. C. 2 Lord Ray. 937. (b) 13 East, 414, note. (c) 4 Nev. & M. 33.
 (d) 2 East, 413. (e) Russ. & Ry. 139.
 (f) 1 Jebb & S. 214. (g) 7 Ad. & El. 58.
 (h) 5 B. & C. 395. (i) Russ. & Ry. C. C. R. 130.

Sir *Thomas Staples*, Q.C., on the part of the Crown, having insisted upon his right to have the last word,

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Mr. *Napier* replied to the *Attorney General*. The cases of *Rex v. Bourne* and *Rex v. Ellis* supply an important principle in favor of the prisoner, because, in those cases, the prisoner was discharged upon the ground that an improper sentence was passed. The present difficulty would not arise, if the counsel for the Crown called upon the Judge to pass the sentence, and exercise that discretion which the law gave him, and which he alone was competent to exercise. But how can your Lordships now pass the proper sentence? How can you say, now, whether one week's imprisonment would not be sufficient? Are you to transport the prisoner or to imprison him? Have you any materials before you to guide your decision as to the punishment you ought to inflict upon the prisoner?—[CRAMPTON, J. Does not this difficulty arise in every criminal issue out of this Court?—There is a great distinction between these cases, because the Court at *Nisi Prius* is an emanation of the Court out of which the issue is sent. *Rex v. Jolliffe* (a). The Judge is merely the minister of this Court; but what authority does the Court possess to compel Mr. *McDonnell* to give his notes, if he refuse?—[CRAMPTON, J. What authority has the Court to compel the Judge who tries a criminal issue out of this Court to do so, if he refuse?—Your Lordships have the same authority as in civil cases, and he could not refuse to give them. And in *Rex v. Read* (b), it was stated by the Court, that “this being a record out of it, this must be taken to be a conviction before the Court,” the Judge at *Nisi Prius*, before whom the trial was had, being for that purpose “the minister of the Court,” and upon that ground the Court awarded the punishment. In *Rex v. Bourne*, as given in *Willm. Woll. & Dav.* 459, the attention of Patteson, J. being called to the decision in *Rex v. Ellis*, as probably caused by the circumstances of the punishment in that case being discretionary, and he then says, that “that certainly does create a distinction between the cases.” There is, therefore, all this upon our side, and not a single case to be found in which this Court pronounced judgment, where the punishment was discretionary. As to the word “respited,” which occurs in the reports of the cases in *Russell & Ryan's Reports*, and which has been relied upon, it merely means this, that the Judge who tried the case settled the amount of the punishment at the time, and respited the execution of it. In *Rex v. Jackson* (c), Lord Kenyon held, “In cases where the punishment is discretionary, and this Court “should be of opinion, after hearing the case argued, that the judgment

(a) 4 T. R. 285.

(b) 16 East, 404.

(c) 6 T. R. 145.

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"ought not to be arrested, a *procedendo* must be awarded, and the "party sent back again to the inferior jurisdiction to receive judgment:" and in *Rex v. Loveden (a)*, the record of a fine having been removed into the Queen's Bench, by *certiorari*, on motion to quash or mitigate it, Lord Kenyon intimated that they could not do this without entering into the merits of the question, which they had no legal means of bringing into controversy before them. In the present case this Court should do the same, in order to pronounce judgment, which it clearly has no means of doing. Although there be a defect of justice, this Court cannot enlarge its jurisdiction, but the legislature must supply the remedy. *Rex v. James (b)*. In *Rex v. Reason (c)*, where the evidence was set out upon a conviction returned by *certiorari*, the Court said the consideration of the evidence was exclusively for the Justices before whom the witnesses were examined, and that they had no means of judging of their credibility. No man can estimate the amount of punishment, who does not witness the whole of the proceedings in the case. It frequently happens that the jury find in opposition to the opinion of the Judge, and this is always an important consideration in estimating the punishment. In this case, Baron PENNEFATHER expressed the strongest opinion that he had no means of determining the amount of punishment, and that he had therefore no authority to do it.—[BUSHE, C. J. The argument you urge as to the inconvenience is much stronger against the competency of the Judge of Assize than against this Court.]—What means has this Court of learning the circumstances that the learned Baron had not? It should not depend upon the courtesy of Mr. *M'Donnell*; he might lose his notes.—[BURTON, J. It seems if Mr. *M'Donnell* had entered the sentence in the Crown-book, and respited it, and then the following Judge had informed the prisoner the amount of it, there would be no objection; yet there is little difference, and both modes are liable to casualties.]—The utmost extent to which the doctrine of acting on the Judge's report was carried, was by Lee, C. J., in the case of *Rex v. Nicolls (d)*. It never has been said that any Court, except the Court to which the Judge who tried the case belonged, could do so; and in the present case, can the Court act upon the report of a Judge whose commission is gone; and can he now, without judicial authority, make up his mind as to the sentence? The 11 *Hen. 6*, c. 6, applies to Justices of the peace, and as to new commissioners, and delegates to new Justices the powers of the old; but in the clause to which the *Attorney General* referred in 10 *Car. 1*, sess. 2, c. 14, applying to commissions of oyer and terminer, &c., there is no such delegation of powers. There were three cases to be provided for: First, where verdict given, but sentence not passed; secondly, where judgment recorded, but not executed;

(a) 8 T. R. 615.

(b) 2 M. & Sel. 321.

(c) 6 T. R. 375.

(d) 13 East. 416, note.

thirdly, where proceeding in *feri*, and adjourned. The 5th section of 10 *Car.* 1, *sess.* 2, c. 14, remedies the first; the 6th section remedies the second, but only, in cases of treason and capital felonies. In these sections, the Judge is enabled to do, what the Judge before whom the trial was had might have done. The latter part of the 6th section gives no delegated authority, but only prevents the issuing of a new commission operating as a discontinuance of the proceedings inchoate and incomplete under the old. Yet, even in these cases, Lord Hale says he would never give judgment, or award execution, upon a person reprieved by any other Judge but himself, because he could not know on what ground he reprieved him. With respect to the case of *Rex v. The Inhabitants of Upper Papworth*, the question there was as to the legality of the sentence; and Lord Kenyon refers to it in his judgment in *Rex v. Jackson*. If this course were legal, we would have some instances of it in the books. There is another case, upon the *Nisi Prius* Court, being an emanation of the Court out of which the record issues. In *Dyer v. Hamsworth (a)*, the Court said, "Where the proceedings originate in an inferior Court, judgment must be given there; but where the proceedings are commenced here, and the record is sent down to be tried below, the defendant is not properly convicted until the record is returned here. The Court of *Nisi Prius* is merely an emanation from this Court, and the proceedings must be returned here before judgment can be given."

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Sir Thomas Staples replied.

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BUSHE, C. J., after stating the proceedings, said, Mr. *Napier* has contended that the prisoner is entitled, to his discharge, and that Baron PENNEFATHER had not authority to pronounce sentence upon him under the 10 *Car.* 1, *sess.* 2. c. 14; and he relied upon the distinction, that although the succeeding Judge may pass sentence where the judgment is fixed, he cannot do so where it is discretionary; and he dwelt much upon the inconvenience arising from the ignorance of the succeeding Judge of the circumstances of the case. If there was no question before us except the construction of the statute, and if it was necessary for us to expound it, we would at once say this case was not within the 5th section of the statute, which relates expressly to capital cases, and it would be equally difficult to bring it within the first part of the 6th section, which is applicable to cases in which the Judge pronounces sentence and respites execution. It remains, therefore, to see whether it comes within the remaining part of the 6th section, which applies

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to every case, embracing criminal cases, and makes no distinction between those that are capital and those that are not; "The new justices of assize, &c., may proceed in every behalfe." This seems to be the only authority for such a proceeding in this country, but in England it has been acted upon in several cases, as appears from the judgments of the Court in *Rex v. Bourne*, and no objection appears to have been taken on any occasion to such a proceeding; and in *Russell & Ryan's C. C.*, the same appears in the orders made upon most of the cases, whether capital or not. I am not prepared to say that a practice so uniform and so favorable to the reservation of criminal cases, is not warranted by the second part of the 6th section of the Irish act. This case, and all the proceedings in it, are now brought before us by *certiorari*, and it is the duty of this Court in all classes of cases to see that justice be not disappointed. Lord Hale has said that this Court is the centre of all inferior jurisdictions, and the same has been asserted by Lord Coke, and also by Chief Justice Holt in *Regina v. Potter*. In *Rex v. Kenworthy*, Lord Tenterden is reported to have qualified the jurisdiction of the Court to cases where the punishment was not discretionary, but that distinction does not seem to be warranted in the opinion of the same Court, as expressed in *Rex v. Bourne*, where Mr. Justice Patteson distinctly stated that "the discretion makes no difference." Upon these grounds we are authorised and bound to pronounce judgment upon the prisoner.

BURTON, J.—This case has been so fully discussed, and it has been argued with so much force and ability, that I am desirous to state my opinion upon it. I concur in the opinion, that this Court has full authority to award the judgment in this case. The offence for which the prisoner has been found guilty is punishable with transportation or imprisonment, at the discretion of the Court. In this case, a doubt arose at the trial, as to whether the crime of bigamy had been committed. That doubt turned upon the validity of a Scotch marriage, and we both* thought the question a proper one to reserve for the consideration of the Twelve Judges; and it was then considered that the mode of reserving the question would be most favorably exercised by not pronouncing judgment then, but respiting the sentence until the decision of the Judges was known, which was accordingly done, and the prisoner was allowed to stand out on bail. The majority of the Judges were of opinion that the conviction was well sustained by the evidence, and it was then understood, without any doubt upon the subject, that the succeeding Judge had the power to pronounce judgment upon the defendant. He, however, doubted as to his authority to do so, or, at all events,

* Mr. Justice BURTON accompanied Mr. M'DONNELL upon the circuit.

whether, in the exercise of his discretion, he had not a right to refuse to exercise that authority; and the defendant was then bound to appear in this Court. The question now is, whether this supreme Court of criminal jurisdiction has authority in this case to award the sentence; and it involves these questions—First, whether, where a conviction has been had at a commission of oyer and terminer, and no judgment has been pronounced, this Court has jurisdiction to award the sentence?—Secondly, supposing this Court has that jurisdiction where the punishment is fixed, whether it has the same jurisdiction where the punishment is discretionary?—Thirdly, whether, supposing this Court has jurisdiction in both these cases, the Judge of Assize has not a similar jurisdiction? Fourthly, whether, under the circumstances, this Court should not remand the prisoner to the Court below, rather than pronounce sentence upon him? As to the first point, the authority of the best elementary writers is decisive, 2 *Hale P. C.* 401, c. 56; and, indeed, as a general proposition, this has not been disputed, but it has been contended that the jurisdiction of this Court is confined to cases where the punishment is peremptory; and that where it is discretionary, not only that a subsequent Judge, but that this Court has not authority to award the sentence. The reason given for this distinction is, that no person but the person who tried the case can exercise the discretion which is given in such cases, from a want of a knowledge of all the circumstances of it. No such distinction is laid down by *Hale*, and the authorities cited do not sustain it to the extent contended for, although they do sustain the objection where the case can be sent back to a subsisting tribunal before which the trial took place. I consider this distinction is sustained by the authorities referred to by my Lord Chief Justice, and also by the case from *Dallison's Reports*, 25, and *Regina v. Boyce* (a): and it was upon this ground that Chief Justice Lee acted in *Rex v. Nicolls* (b), namely, that the Court of Queen's Bench had no means of acquiring the necessary information, adding, "If this trial had been before a Judge of this Court, we might have had his report," clearly importing, that in such a case, although the punishment was discretionary, the Court might award judgment. The present is not the case of an inferior subsisting tribunal of which he spoke; at all events, there is not the same means of acquiring information as the Sessions had, which was the reason of remitting the case to them; but commissions of oyer and terminer and general gaol delivery confer a co-ordinate jurisdiction with this supreme Court, and, consequently, this Court has the means of acquiring the necessary information, just as if the case had been tried by a Judge of this Court. If the case had been tried by a Judge of this Court, according to Chief Justice Lee, there would be no difficulty, although it has been

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(a) 4 Burr. 2073.

(b) 13 East, 415.

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said that he had in his mind the case of a Judge of the Court of Queen's Bench trying a case initiating in this Court. There is some difference in this respect, but, practically, it is one and the same thing. The Court has exactly the same means of inquiry in a case like the present, that it has in a case initiating in this Court, or tried by a Judge of this Court, and it is as much the duty of the Judge who tried the case to give the necessary information, as if he had been a Judge of this Court. The information in both cases is precisely the same, and obtained in the same way; and, considering that the Judge has a co-ordinate jurisdiction with this Court, I cannot see the objection to this Court giving judgment in the one case or in the other. Upon these grounds, I am clearly of opinion that this Court has the jurisdiction which it is about to exercise. The argument would extend, if well founded, to every case, whether it originated in this Court or not, because it is impossible and impracticable for any Judge to put the Court into the same condition as his own mind is in; and as to the demeanour of witnesses, that is not of so much force, when considered. For example, what has the demeanour of witnesses to do with circumstances of extenuation or aggravation of punishment? It is a matter for the consideration of the jury. The argument, when pushed to that extent, goes too far, and that upon the authority of cases decided at the Quarter Sessions, between which, and those decided by a Judge of Assize, it is impossible not to see the difference. The observation of Chief Justice Abbott, in *Rex v. Kenworthy*, has been relied on, but I do not think it has the force contended for. That was a case from an inferior subsisting tribunal, and Chief Justice Abbott merely meant, that this Court will not unnecessarily exercise that jurisdiction where there is another jurisdiction in existence, before which the party was convicted; but I do not conceive that he intended thereby to convey that the Court of Queen's Bench could not, in any case where the punishment was discretionary, award judgment. In my opinion, this supreme Court has this jurisdiction, and it has the same means of information as in criminal informations and other cases it would have. As to the power of the subsequent Judge to exercise this jurisdiction, Baron PENNEFATHER entertained doubts as to his having this power, and was quite certain he was not bound to do so, and I think he was not; but I am also of opinion that he had full jurisdiction to do so under the statute, and it has been acted upon in England, and also in this country. The next question, whether, as the case stands at present, it is more fit that this Court should now pronounce the sentence, or remand the prisoner, in order that the next going Judge of Assize may do so; I have no difficulty on this part of the case. We have it now before us, and we have all the means of acquiring information which the next going Judge of Assize can have, and there is, therefore, no reason why we should devolve that duty upon another. If it afforded any advantage to the pri-

soner to remand him to be sentenced by the next going Judge of Assize, we would do so; but when we have the same means that he would have of determining upon the sentence, we are bound to deal with the case.

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CRAMPTON, J.—The questions in this case are so very important, involving, as they do, the jurisdiction of this Court, I feel it to be my duty to state the views I entertain upon them, especially as respects the jurisdiction of this Court. Upon the several questions, I have arrived at the same conclusion as my brethren who have preceded me. As to the jurisdiction of the Court, it is as old as the Court itself, upon the authority of the best elementary writers and some decided cases; it is derived from the common law, while the jurisdiction of the commissioner is created by statute. *Hale* says, this Court “is the centre of all subordinate jurisdictions;” and again, “If A. be indicted of felony before Justices “of the peace, oyer and terminer, and be convict, if the record of the “conviction be removed into the King’s Bench by *certiorari*, and the “prisoner also be removed thither by *habeas corpus*, that Court may give “judgment upon that conviction.” The cases referred to are certainly capital cases, but the passage contains no exception, such as was contended for by Mr. *Napier*; and *Hale* adds, in another passage, “And, indeed, “there was no other remedy before the statutes of 11 *Hen.* 6, c. 6, and “1 *Ed.* 6, c. 7.” The first of these statutes relates to Quarter Sessions, and the second is in terms the same as the 10 *Car.* 1, *sess.* 2, c. 14, *Ir.* and they repudiate the notion that this Court has not the power to pronounce judgment where the punishment is discretionary; and if we held that, we would place the criminal law of the country in this way, that in a great variety of cases there would be no remedy, especially where, before the 11 *Hen.* 6, c. 6, there was no remedy, except from this Court, for cases that occurred at the Quarter Sessions. It was admitted that in every case the Court may award execution, although it cannot pronounce judgment; but in 2 *Hale*, 407, he says, “They who may “give judgment may award execution.” And in 2 *Hawk. P. C.* c. 3, s. 6, the same jurisdiction is asserted, without any exception in respect to the punishment. The language of that passage applies to two classes of cases: first, to cases before verdict; secondly, to convictions returned to this Court from inferior jurisdictions, in order to be taken up where the inferior jurisdiction finished. The same is laid down in *Chitty C. L.* 698, without any exception; and in *Stephen C. L.* it is also stated that the Court of Queen’s Bench may pronounce judgment in every case. This is, therefore, the common law of the land. I have looked into all the authorities, and I think there are adjudged cases in support of this jurisdiction, and not one to conflict with it; but I do find expressions thrown out by two Judges, which, if they mean what has been attributed to them, they would limit this jurisdiction; but if we carry in our minds

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the distinction which has been already taken as to the existence of the jurisdiction, and the discretion as to the exercise of it, we will find, when we look into the cases, that they contain nothing repudiating the jurisdiction, but merely the exercise of that jurisdiction; and all the cases were cases where the record was removed for error; but in cases like the present, removed for judgment, there are authorities in support of this jurisdiction. *Rex v. Potter* decides the two points which I have been discussing: first, the existence of the jurisdiction; and, secondly, the exercise of it. The passage which has been already read from this report furnishes a key to all the subsequent cases, because it is clear from it that the Court will not exercise its discretion where there is a permanent Court existing, having the same Judges who tried the case; but it is otherwise where the defendant has been tried before a commissioner who is changed; and the defendant, if remanded, would not be sentenced by the same person by whom he was tried.

His Lordship then referred to *Rex v. Morris*. Another important case is that of *Rex v. The Inhabitants of Upper Papworth*, which was the case of an indictment removed by *certiorari* at the instance of the prosecutor, and not by the defendant, for error, which is an important distinction. *Rex v. Kenworthy* was a writ of error by the defendant, and the question was, whether there was a judgment or not? And with respect to the case of *Rex v. Ellis*, it is too much to infer from the observations of Lord Tenterden, that this Court has no jurisdiction where the punishment is discretionary. The case of *Rex v. Jackson* was also a case which the prisoner removed upon objections to the indictment; and although in that case Lord Kenyon said that it should be sent back, because the punishment was discretionary, yet being a case from the Sessions, which was a permanent Court, it might be quite right in him to say so, without meaning to convey that the Court had not jurisdiction in any case when the punishment was discretionary; and in the very same case he adopts the authority of *Rex v. Potter*. In the case of *Rex v. Nicolls* (a), it appears that the Court went upon the authority of *Rex v. Baker* (b), where it was held that "this Court will not give judgment upon a conviction in another Court," which is manifestly wrong, and then the prisoner is allowed to waive a verdict of guilty, which is such an extraordinary statement as must prevent any Court from acting upon the case; and the case of *Rex v. Nicolls* was also a case from the Sessions. Upon all these grounds, notwithstanding the able argument of Mr. Napier, I am of opinion that there is in this Court an original inherent jurisdiction to pronounce judgment in cases like the present. Neither have I any doubt upon the second question, namely, the jurisdiction of the subsequent Judge to pronounce the sentence; the words of the act are strong and clear. As to the third

(a) 13 East, 412.

(b) 13 East 414; note, (a).

question, I also concur in opinion, that we ought to pronounce the sentence rather than send the case to the Assizes, and for the reasons already stated ; as also in order to prevent the delay and expense which would occur. Besides, in the cases which have been cited, there were not *certiorari* ; here we have the *Attorney-General* calling upon us to pronounce judgment.

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PERRIN, J.—The prisoner was convicted before Mr. *McDonnell* the last Spring Assizes, at Monaghan, of bigamy ; he, doubting the sufficiency of the evidence of the first marriage, respited the sentence, and submitted that question to the consideration of the Twelve Judges ; in conformity with the opinions of the majority of the Judges that doubt was removed. The prisoner was brought up before Baron PENNEFATHER at the last Assizes at Monaghan, for judgment, who declined to pronounce sentence, not (as it is said) thinking that he had authority to do so. The record of the conviction has been removed here by *certiorari*, and this Court is called upon by the *Attorney-General* to pronounce judgment or to remand the prisoner, and record to Monaghan that the next going Judge of Assize may do so there ; on the other hand, the prisoner's counsel contends, that we should not remand him, as according to Baron PENNEFATHER's opinion, the subsequent Judge of Assize has no authority to pronounce sentence on this indictment and that this Court cannot pronounce judgment upon him ; and he argued, first, that it has not jurisdiction to give judgment upon any conviction had in another Court ; secondly, that where the punishment is discretionary, it has not jurisdiction to measure and pronounce sentence upon a conviction had in another Court. A case from *Carthew* 6, *Rex v. Baker*, was cited to support the first position, and certainly the position is there laid down, but the note to the case is very short, and is probably incorrect ; and although it is inserted as occurring in T. T. 3 *Jac.* 2, it is probably the same case as that reported under the same name in 1 *Mod.* 35, and 2 *Keb.* 594, in *H. T.* 21 & 22 *Car.* 2, where no such point is noticed : they all relate to an indictment for slander in Hull. However, I have no hesitation in pronouncing the position reported in *Carthew* not to be law. That the King's Bench has such jurisdiction in cases of felony, 2 *Hale*, 401, already cited, is express authority, sustained by *Dalison*, 25, *pl.* 7, and by the cases of *Rex v. Athol* (a), and *Rex v. Boyce* (b), in both of which judgment of death was pronounced in the King's Bench, upon indictments found and tried, and convictions had at the Assizes. But it has been said, that in these cases the punishment was fixed and not discretionary ; and it has been strenuously argued, that the Court of Queen's Bench has not jurisdiction to pronounce judgment upon a conviction had in another Court, where the punishment is

(a) 1 Str. 553.

(b) 4 Burr. 2073.

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discretionary. It has been ably urged to be most reasonable and convenient (as no doubt it is more convenient where it can be done), that the Judge or Justices before whom the case was tried, and who are, therefore, directly cognizant of the facts and merits, should admeasure the punishment, where it is discretionary; and the case of *Rex v. Nicolls* was cited from 2 *Str.* 1227, and *Ford's MSS.* 13 *East*, 412, in the notes; also Lord Kenyon's observations in *Rex v. Jackson*, and a passage from the judgment of Chief Justice Abbott, in *Rex v. Kenworthy*, as reported in 1 *B. & C.* 713, to sustain the position. In neither report of *Rex v. Nicolls*, is such a position expressly ruled; and if the Queen's Bench did send that case back to Sessions, a permanent Court, fully cognizant of the merits for the admeasurement of the sentence, it did so more probably for convenience, than from a notion that the Queen's Bench could not give judgment on such a conviction in another Court, as my Brother CRAMPTON has already observed, and applied to the passage cited from Lord Kenyon's judgment in *Rex v. Jackson*, in whose observations upon the meaning and language attributed to Lord Tenterden in *Rex v. Kenworthy*, as reported in 1 *B. & C.* 713, I entirely concur; and I will merely add, that in the report of that case in 3 *D. & Ry.* 173, no such general expressions are to be found; but that report shews that the rule there was made by reason of the words in the particular statute under which the conviction was had, and not upon any notion that this Court has not jurisdiction to give judgment upon a conviction in another Court, where the judgment is discretionary. The reason assigned by *Hale*, in the passage cited by my Lord Chief Justice, and to which I have already referred, "that before the statutes there was no other remedy, where "the former commission is determined by a new one," extends and applies equally to cases where the punishment is discretionary as where it is fixed. The authority of Lord *Holt* has been already cited by my Lord Chief Justice from 2 *Lord Ray.* 938, and fully observed upon by my Brother CRAMPTON approving, *obiter* to be sure, the proceeding of removing a conviction on an indictment for words in Gloucester, that the Queen's Bench might give judgment, for the greater example. In addition to this, I find, in the case of *Rex v. John and Mary Spragg* (a), which is very fully reported, a judgment actually given after much deliberation by the Court of King's Bench, *T. T.* 33 & 34 *G.* 2, upon a conviction had at the Assizes of Wiltshire, the year before, for a misdemeanor (conspiracy) at common law, where the punishment was discretionary, remarkably so, as, by the judgment of the Court, the one prisoner was sentenced to two years' imprisonment, and £50 fine, and the other to imprisonment for six months only. This case was long depending, and several times before the Court, very zealously argued by able counsel,

(a) 2 *Burr.* 930, 992, 1027.

and no such objection as this suggested. The judgment of the Court was pronounced by Sir Michael Foster, a Judge eminently versed in criminal law. This is an authority of the gravest character, governing the present case, completely putting to rest the difficulties raised on supposed *dicta* of Judges and arguments of counsel. It is an express and solemn judgment of the Court of King's Bench upon a conviction at the Assizes, imposing discretionary sentences upon the two prisoners, varying according to the Court's sense of their respective demerits, pronounced after the greatest deliberation, within a very few years after the case of *Rex v. Nicolls*, and by two of the same Judges who ruled that case; to whom, therefore, it is impossible to impute not only that they did, twelve or thirteen years before, decide that the Court had no jurisdiction to pronounce the solemn and grave judgment they then awarded, but that the former contradictory judgment was within that period forgotten in Westminster Hall, or *sub silentio* overruled. Upon these grounds then, I am satisfied that no such decision was made in *Rex v. Nicolls*, and that this Court has, by the common law, jurisdiction to give judgment upon this conviction, the record being duly removed and filed here together with the prisoner. I also think we might have remanded the case and prisoner, if deemed more convenient and advisable to do so. For it seems to me, with every respect for the learned Baron whose opinion to the contrary has been stated, but whose reasons are not reported, that a Judge at a subsequent Assizes has jurisdiction to pronounce sentence upon a conviction had at a former Assizes, as well in misdemeanours, as in all felonies, whether capital or not. It appears to me that the latter clause of the 6th sec. of 10 Car. 1. c. 14, clearly comprises the case, "And over that no manner of processe or suite, made, sued, or had before any Justices of Assize, gaole delivery, oyer and terminer Justices of peace, or other of the King's Commissioners, shall in anywise be discontinued by the making and publishing of a new commission or association, or by altering of the names of the Justices of Assize, gaole delivery, oyer and terminer Justices of peace, or other of the King's Commissioners; but that the new Justices of Assize, gaole delivery, and of the peace and other commissioners, may proceed in every behalfe as if the old commissions, and Justices and commissioners had still remained and continued not altered;" it confers complete jurisdiction on the new commissioners to *proceed in every behalfe* as if the old commissioners had still remained and continued not altered, either to try an indictment found, but not tried, at the former Assizes, or to give judgment, upon a conviction had thereat, but on which no judgment was pronounced; and numerous cases shew that such has been the practice in England.

The prisoner having been called upon, Mr. Napier stated he had left town, under the belief that the judgment would not be delivered until next term, and an arrangement was made with the *Attorney-General*, by which he was ordered to attend the first day of the ensuing term to receive his sentence.

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Thursday, November, 7th.

**PRACTICE—NOTICE—ARREST—MOTION TO DISCHARGE
A MARRIED WOMAN.**

KING v. KEENAN.

Upon a motion to discharge a defendant from custody, upon the ground that she is a married woman, notice of the motion must be served on the opposite party, even to obtain a conditional order.

Mr. O'HAGAN applied on behalf of the defendant, a married woman, that the bail-bond in this case might be delivered to be cancelled, and that she might be discharged from custody upon entering a common appearance. He moved upon the affidavit of the defendant, in which she stated she was a married woman, and had contracted the debt since her coverture.—[**PERRIN, J.** Have you served notice of this application?]**—We only seek a conditional order.**

PERRIN, J. You must serve notice of this application before I can make any rule upon the motion.

No rule.

Thursday, Nov. 7th.

**PRACTICE—COSTS IN THE CAUSE—FRIVOLOUS
DEMURRER.**

ANON.

Where a frivolous demurrer was filed, and on motion to take it off the file, that motion was granted, and the party who filed it ordered to pay costs:—

that an attachment may issue for these costs, as they could not be included in the execution, not being costs in the cause.

Mr. NAPIER applied in this case for a conditional order for an attachment, for non-payment of costs. A *scire facias* had been filed, and a frivolous demurrer put in, which was subsequently ordered to be taken off the file, and the costs to be paid to the plaintiffs.—[**PERRIN, J.** Could you include these costs in the execution?]**—We could not; they are not costs in the case.**

PERRIN, J.—Take a conditional order.

Mr. Napier, on a subsequent day, made this order absolute, upon a certificate of no cause shewn.

Monday, Nov. 25th.

**PRACTICE—JUDGMENT—STATUTE OF LIMITATIONS—
INSOLVENT SCHEDULE—ACKNOWLEDGMENT.**

M'CARTHY v. O'BRIEN.

Mr. BERWICK applied for liberty to issue a *scire facias* to revive a judgment against the heir and tenants of the conuzor. It appeared that the judgment was of Michaelmas Term, 1814; that the conuzor of the judgment, upon the 1st of December, 1819, presented a petition to be discharged as an insolvent debtor, and filed a schedule of the debts he then owed, pursuant to the Act for the relief of Insolvent Debtors, and set forth this judgment debt, thus acknowledging that it was then due. It was submitted that this case was out of the 8 G. 1, c. 4, the judgment being alive when the 3 & 4 W. 4, c. 27, was passed.—[BURTON, J. To whom was the acknowledgment given upon which you rely?—The schedule contains the names of the several persons to whom the petitioner is indebted, with the respective sums he owes to them, and it is subscribed by the petitioner, and verified on oath.

BURTON, J. Be it so, upon the terms of serving the heir personally, and not reviving on *nils*.

Motion granted.

personally, and not reviving on *nils*.

Scire facias to revive a judgment against the heir and tenants of the conuzor. Judgment of 1814; the conuzor an insolvent in 1819; judgment debt in his schedule of debts, filed 1st Dec. 1819; upon the ground that this was a sufficient acknowledgment in writing, within the 3 & 4 W. 4 c. 27, the Court allowed the *sci. fa.* to issue, upon the terms of serving the heir

COMMON PLEAS.

Tuesday, January 14th.

OYER OF DEED.

Honorable LEICESTER STANHOPE and others, Trustees of the National Bank of Ireland, Plaintiffs: QUILL, Defendant.

In an action against R. F. Q. as accountant of the Longford branch of the National Bank he applied to the Court to compel oyer of the deed of settlement. The application was refused with costs.

IN last vacation *Mr. Richard O'Connell*, on behalf of defendant, applied to the Chief Justice in chamber, that plaintiffs be compelled to lodge with the proper officer, the deed of settlement of the 6th January, 1835, mentioned in the alleged writing obligatory, dated the 13th June, 1836, &c., in order that said defendant, or his attorney, may inspect said deed and take a copy, &c.; or of such parts as relate to the appointment and duties of the several officers of the said Banking Company, &c. The motion was refused, without prejudice to its being made before the Court, after further consideration by the defendant.

Mr. O'Connell now renewed his application. This is an action against defendant as clerk of the National Bank, upon his bond to the trustees. The bond recites that the plaintiffs were trustees under the deed of settlement, &c. The condition of the bond is for the faithful services of defendant at the Longford branch of the said bank, or at any other place in Great Britain or Ireland, &c.; either as accountant or in any other capacity. If the defendant continued at Longford, and were not sent anywhere else, he would have no right to see the deed here. Under the old practice he would be entitled to oyer. [On inquiry of the officer it was learned that such was not the practice for the last fifty years.] Notice was served on plaintiffs, that if they would confine their breaches to acts done at Longford, we would not make this claim, and I repeat it now. If a party be interested in a deed, the Courts will enforce its production. *Lord Arlington v. Merricke (a)*, *Blakey v. Porter (b)*, *Bateman v. Philipps (c)*, *Radcliffe v. Bleasby (d)*, *Blogg v. Kent (e)*, *The King v. Justices of Buckingham (f)*, *Alexander v. Alexander (g)*. Our affidavit states that oyer is necessary, and the application not made for delay.—[COURT. But does it suggest *why* it's necessary to see the deed?—No, it does not; in *Radcliffe v. Bleasby*,

(a) 2 Saund. 415.

(c) 4 Taunt. 157.

(e) 4 Moore & P. 433.

(b) 1 Taunt. 386.

(d) 10 Bail Moore, 523.

(f) 8 B. & C. 375.

(g) Ale. & Nap. 109.

Chief Justice Best says "I for one agree with the observation made by Sir James Mansfield in *Clifford v. Taylor*, that the practice of compelling the delivery of copies of papers, is most convenient, as it saves the delay and expense of a bill in equity."—[BALL, J. Do you think you could compel the plaintiffs here by a bill in equity?—I think I could. I called on them by notice to say what breaches they would assign.—[TORRENS, J.—This is not a Court to search the conscience of a party.]

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Mr. *Monahan, contra.*—They have no right, either now or at any stage of the case, to see the deed. In *Lord Arlington v. Merricke* the condition was, that if the party should perform certain instructions annexed to the deed, &c. The bond here does not refer to the deed, except as to the plaintiffs being partners. The condition of the bond is, that if defendant shall account with plaintiffs from time to time, &c.; shall not make false entries, &c. Now this action is against the defaulting gentleman himself. The deed is not necessary for his defence, and even if it were, the Court cannot compel the plaintiffs to produce their property; it is not the defendant's deed. *Pickering v. Noyse* (a), shews that the Courts will not attempt to compel a party to produce a deed unless he be a trustee of it. In *Alexander v. Alexander* (b), a similar application was refused with costs.—[TORRENS, J. I recollect an extreme case referred to in *Portmore v. Goring* (c), where the Court refused to compel a party to allow the inspection of one part of an indenture where the other was lost at sea.]

DOHERTY, C. J.

When this case was before me in chamber, I felt no doubt about it, and of the consequences of persevering in the application. I did not visit the defendant with the costs of that motion, warning him, while I allowed him to consider and look into the cases, that if he persevered and failed, it would be at the peril of costs. He has done so, and we think that this application, so far as relates to the production of the deed, must be refused with costs.

The costs of the motion in chamber to be costs in the cause.

Application refused.

(a) 2 D. & R. 386, & 1 B. & C. 262.

(b) Alc. & Nap. 109.

(c) 4 Bing. 152.

*Tuesday, January 14th, and Thursday 16th.*

DEMURRER—STATUTE OF LIMITATIONS.

ARMSTRONG v. LLOYD.

*Quere*—Is the recovery of arrears of rent reserved by indenture governed by the 42d sec. of the 3 & 4 W. 4, c. 27?<sup>p</sup>

THE declaration stated, that Vaughan Waldron, at the time of making and executing the indenture of demise hereinafter next mentioned, to wit, on the 10th January, 1806, at Ashfort, in the County Roscommon, was seized in his demesne of freehold, for the term of the life of him, the said V. Waldron, of and in the lands and premises hereinafter mentioned to be demised; and being so thereof seized, he, by indenture, &c., did demise unto the said defendant certain premises, therein particularly mentioned and described, to have and to hold the said, &c., from the 25th March then next (1806), &c., for 21 years, &c., at the yearly rent of £149. 19s. 6d. late Irish currency; gale days, September and March. It then stated the usual covenants on lessee's part; a bargain and sale, and release of the reversion to plaintiff's father, and his death in January 1814, leaving plaintiff his eldest son and heir-at-law. It then stated that plaintiff being so seized, and the said defendant so possessed "on the 25th March, 1828, at &c.; £824. 17s. 9d. late Irish currency, and equal to £761. 8s. 2½d. present currency, of the said yearly rent, &c., for five years and one half of a-year of the said term, &c., became and was due, &c.; contrary, &c." As to £149. 19s. 6d. one year's rent, ending March 1828, defendant demurred; for the lease being made in March 1806, for 21 years, it expired in March 1827; and as to the remaining £674. 17s. 9d. Irish, defendant pleaded several pleas, the two last of which were the statute of limitation, 3 & 4 W. 4, c. 27, s. 42,\* with slight

\* 3 & 4 W. 4, c. 27, s. 42, enacts, That after the 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or

his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such

variations in each. To these plaintiff demurred. Joinder.—Counsel for the plaintiff was about to commence, asserting his right as having the principle question, but the defendant's counsel thought otherwise, and the Court ruled with them. Plaintiff then allowed the first demurrer, and that on the statute of limitations was now argued by

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Where both plaintiff and defendant demurred; *Held* that the party who first demurred had the precedence in argument.

Mr. Napier for the demurrer.—The question depends on the construction of the 42d section of the 3 & 4 W. 4, c. 27. This action is brought against defendant as lessee, on his covenant for arrears of rent; therefore it is a mere personal action. The true construction of the statute is, that it applies only where the land is to be made debtor.

Wherever a periodical sum is sought to be recovered, as a charge on land, the statute applies, but not where you go on a personal or collateral security. This statute extends to England and Ireland; there is a subsequent one for England alone, 3 & 4 W. 4, c. 42. We may consider this case as if in England before that act. In *Murray v. India Company* (a), Abbott, C. J., says, "The several statutes of limitation, being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same." There are two classes of statutes of limitation; one relating to real property, the other to personal actions. The first statute was the 32 H. 8, c. 2, which related to real property generally, and in *express words* to avowries for rents, suits and services. There are several matters within the express language of this act held not to be within its meaning, amongst others, *rent upon indenture*, Co. Litt. 115 a, and other cases in 2 Inst. 95–6. In these instances the title and object of the act limited the generality of its language. The 21 Jac. 1. c. 16, is the next in order of time. It provides for a limitation in several personal actions, also for one or two matters omitted in 32 H. 8, and contains a provision for "all actions of debt for arrearages of rent." In *Freeman v. Stacy* (b), which was a count on a lease by indenture for one and twenty years rendering rent, and in debt for arrearages due more than six years before action brought, the question arose on a special verdict whether this was within the 21 Jac. 1, c. 16. Lord Richardson, C. J. at first was of opinion that being within the express words, it was within the enactment; but afterwards, *mutata opinione*, agreed with

(a) 5 B. & A. 215.

(b) Hutton, 109.

time may have exceeded the said term of six years.

The definition of rent in the first section is, and the word "rent" shall extend to all heriots, and to all services and suits for which a distress

may be made, and to all annuities and periodical sums of money charged upon, or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole).

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the rest of the Court, that it was not within the act, for two reasons. First, the context shews that a specialty debt was not intended to be included; and secondly, the construction put on the word rents in the 32 H. 8, c. 2. The case of *Sherwin v. Cartwright* (a), also shews that these acts are to be construed strictly; I am at liberty here to take both in aid to give a uniform construction. In our case a vested right is sought to be defeated, therefore, the enactment should be unequivocal. In *Buckeridge v. Flight* (b), Holroyd, J., says, "Where acts of parliament vary, or take away the rights of parties, they ought to be construed strictly." The principle of construction to be deduced from these cases is, that the general words are to be qualified by the title and object of the statutes in which they occur. As the law stood upon these acts, there was no statutable limitation—for, first, certain rents, suits and services within the *genus* in 32 H. 8: second, freehold annuities: third, lagacies (on land): fourth, portions: fifth, equitable charges: sixth, distresses: seventh, actions on specialties. All but the last related to real property; the seventh to personal actions. The 3 & 4 W. 4, c. 27, was brought in by the real property commissioners, and professes by its title and language to deal with *real property*: it consolidates the provisions of 32 H. 8, c. 2, and so much of 21 Jac. 1 as relates to realty, and provides for the cases omitted in 32 H. 8; and then provides for rents, suits and services, omitted from the statute of Hen. and not in the statute of Jac. The 3 & 4 W. 4, c. 42, was brought in by the common law commissioners, and relates to personal actions, it provides for the case of actions on specialties omitted in 21 Jac. 1. By this, actions are to be brought within twenty years, and not after. The rule of construction deducible from the decisions on the former acts clearly excludes our case from c. 27. It is manifest from the definition of rent in the first section, that a periodical sum, when sought to be recovered merely as a specialty demand, is not within the enactment; therefore, *Hutton's* report of *Freeman v. Stacy* applies forcibly. Take the case of a mere personal annuity, without a clause of rent-charge; a mere deed covenanting to pay £100 a-year. Could that be said to come within this act? The covenant is simply a *contract* to pay a periodical sum during the continuance of the demise. Suppose a lessee makes a deed of annuity, and covenants to pay the annuity during the demise, that is not within the act; the lessor has a double remedy—against the land, and a personal one on the covenant. It is like a mortgage with a bond collateral. Suppose a clause of rent-charge in the deed, but not resorted to, that is not within the act: the rent-charge may be assigned without the covenant; so the rent may be assigned by the reversioner, and the assignee may bring debt—he has no remedy

(a) Hutton, 103.

(b) 6 B. & C. 55.

against the land. Suppose a bond by sureties for lessee's performing the covenants. It is not the power of proceeding, but the electing to proceed against the land which brings the case within the act, and the personal remedy is not impeached by having another remedy.

Sir J. Campbell was one of the framers of this act, he was conversant with the construction given to the former ones, and the reasons which respectively caused the previous decisions. The title, object, and context all combine here. There is no provision for cases of disability, or of part payment, but both are provided for in c. 42. If the defendant were in England, twenty years would clearly be recoverable. If in Ireland, is the plaintiff to have but six? This will equally apply whether the lands be in England or Ireland.

The object of c. 27 was twofold, to simplify the decisions of questions of adverse title, and to reduce the number and amount, and discourage the continuance of incumbrances affecting real property. From sec. 1 to 39 relates to adverse title; sec. 40, to the recovery of lump sums affecting land. Personal legacies are not included. *Campbell v. Sandford* (a). Sec. 42 relates to "distress, action, or suit," &c.

It is manifest these words must be taken distributively, as interest could not be recovered by distress; and in the latter part of the section "action or suit," is expressly applied to proceedings for recovery of interest on an incumbrance; and the proviso at the end of the section applies altogether to incumbrances. The effect of sec. 42 will be to limit the remedy against land, by action or suit, to six years, leaving the personal remedy for the residue. In *Paget v. Foley* (b), it was not necessary for the Court to decide; but far as *dicta* can go, we have very strong ones in our favor.—[States here the *dicta* of Tindal, C. J., with two of his brethren in favor of his argument.]—Sir Michael O'Loghlen has had this question before him in *Keily v. Bodkin* (c): he said that judgments do not come within c. 27; and in a former part of his judgment, he reasoned from the title of the act, that it was applicable exclusively to actions and suits relating to lands. *Bruen v. Nolan* (d), was principally on the construction of a leasing power—this point was but little discussed; and in *Hill v. Hughes*, a case in the Court of Exchequer, in which I was counsel, judgment was given for the plaintiff on demurrer to a plea as here, the defendant declining to argue it. In the 10th vol. of the *Law Magazine*, p. 358, in the note, "This act is said not to include rent reserved on common leases;" the same is repeated in p. 360. The question has not been decided in England; but with such strong *dicta* in our favor we should give it careful consideration.

Mr. Smith, Q. C., and Mr. Charles Andrews, *contra*. In construing sec. 42, our reading is to connect "no arrears of rent" with the sub-

(a) 8 Bligh, N. R. 648.  
(c) 5 L. Rec. N. S. 245.

(b) 3 Scott. 120.  
(d) 1 Jebb & S. 246.

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sequent part of the sentence, to which it must refer; thus, no arrears of rent shall be recovered by any distress, action or suit, but within six years next after the same shall become due: the word rent being used without explanatory words, applies to lands. One construction contended for, on the other side, is to connect "arrears of rent" with the passages immediately following, which would be very ambiguous. What would be the meaning of "no arrears of rent" in respect of any legacy? Taking the words separately they are plain, and apply to all cases of rent on demise, contracts under seal, or parol contracts. Mr. *Napier* admits that this act applies to rents *on parol contracts*, and that such cases alone were governed by the previous statutes, and he relies on *Freeman v. Stacey*; but from the reasoning of the Judges in that case it will appear an authority for us. They reasoned, that debt for rent should, under the statute of *Jac.* be confined to cases on parol contract, because by the context specialties were excluded: and the same construction was put on the statute of *Jac.* in *Hodsdon v. Harridge* (a). I admit that from the case in *Hutton*, till the passing this act, there was no limit as to suits on specialties; but there are no express words in sec. 42 to shew specialties are excluded; on the contrary, from the context it appears they are intended to be included, and of such opinion was Bosanquet, J., in *Paget v. Foley*: other specialties are included, and would the legislature include other specialties and exclude rents? Look to the meaning of "rent" in the interpretation section; the word is used in a most extended sense; and that conventional rents between landlord and tenant are meant, appears from the word distress. Sections 40 and 42 are to be considered together—the former, applicable to sums in gross, limits the period to twenty years. The latter to periodical claims, as rents, &c.; and the limit six years is the claim of rent to be thus limited and the mere collateral personal security to continue.


With reference to the argument as to personal security, I refer to the word annuity in the first section; if annuities were not to be barred, the word rent-charge would have been used instead. With respect to the cases which have been decided in this country, *McKiernan v. Halliday* (b) is an express authority; there BURTON, J., said that *Padon v. Bartlett* (c) was an authority so much in point, that the Court would decide without going farther—and that case was not carried farther, (as it probably would by Mr. *Napier*, if he hoped to succeed,) by bringing it to a Court of Error. The only other Irish case is *Bruen v. Nolan*; that action was brought exactly as this, and there cannot be shewn a distinction between the two. There we satisfied the Court that the *dicta* of the Judges in *Paget v. Foley* were only extra-judicial opinions,

(a) 2 Saund. 65, a.

(b) 4 L. Rec. N. S. 58.

(c) 4 Nev. & Man. 321. [See also same case 5 Nev. & M. 383—ED.]

and not much weight is to be given to the extra-judicial opinions of any Judge: indeed, the only argument advanced on the other side is, that a subsequent act was passed in England, repealing chap. 27, but that act does not extend to this country.

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Mr. *Monahan*, in reply, said he could not add anything to the argument of Mr. *Napier* on the question whether the statute at all applies to rents reserved by deed, except the great improbability of the legislature repealing chapter 27 by chapter 42; therefore, it was the duty of the Court to endeavour to reconcile both acts; and that could be done by confining the former to proceedings directly against the land. It might possibly be held that in *Replevin*, the case in the Queen's Bench, though the rent were reserved by indenture, the party was not entitled to more than six years. But where the proceeding is not immediately against the land, but against the person and personal estate, it is different. I do not concede anything maintained by Mr. *Napier*; but even if his argument could not bear as to distress for rent, the statute would have no application to personal actions. Most of the purview has relation to real estate. It may be true, that if a tenant owing a large arrear of rent, assign the land, the assignee may be chargeable with only six years, yet the assignor is liable for all if recoverable under *the covenant*. The first section defines the words lands, rent, &c.; the second enacts, that no land or rent be recovered but within twenty years. This means where the action is to assert title. Mr. *Smith* argues, that with respect to mortgages, they are created by specialties, and that, therefore, specialties were within the contemplation of the legislature; but it is an admitted opinion, that if the proceedings on the mortgage were not against the land, but on the personal covenants, he is liable to the full arrears.

A subsequent act in the same session, or a subsequent clause in the same act, may repeal a prior one. But if there be a number of acts, where the subsequent one does not repeal the prior, you must construe both so as to make them consistent. By section 41, no action shall be brought for arrears of dower longer than six years. That is necessarily against the land, it cannot be against the person. By section 42, "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of land, &c., shall be recovered but within six years after the same shall have become due." If, in all the other sections, the legislature have before them cases against the land itself, will you say that here the act extends to a case where the action is against an individual? In chap. 42, twenty years are given for several different actions on specialties; taking the two acts together, if an action for distress be brought in England it must be decided as governed by chap. 27, for there is no provision for *Replevin* in chap. 42. The grand difference

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between the acts is, that the first relates to actions concerning land, the other to personal actions. The reasoning of Tindal, C. J., in *Paget v. Foley*, as reported in 2 *Bingham, N. S.* 688, reconciles the two acts, and shews that they do not conflict respecting rents reserved by lease.

There is another ground on which I have your lordships deliberate opinion, that we are entitled to succeed here, even if section 42 apply to proceedings against the defendant. That we are entitled to recover six years, *Foley v. Dumas* (a) is exactly in point—[States the facts and compares the two cases]—We are within the very terms of that case. The cases in the Queen's Bench and Exchequer do not conflict with *Foley v. Dumas*. In one the rent was sixteen years in arrear, in the other four years, and the Courts decided that only six years could be recovered.

*Cur. advis. vult.*

(a) Smythe, 78.

Tuesday, January 14th.

#### DEMURRER—PLEADING.

THOMAS and PATRICK RYAN v. SAMUEL YOUNG, and others.

A plea commencing as an answer to the whole of a count or avowry, but afterwards professing to answer, and answering only a part:—*Held* good, on general demurrer.

*Scatch.*—It would be bad on special demurrer.

THIS was an action of replevin. The defendants put in several avowries, which stated the taking to have been for rent in arrear. To these there were several pleas in bar; and to the fourth plea, to the second, third, and fourth avowry respectively, defendants demurred generally.

The second avowry stated the taking for £94. 1s. 3d. sterling, one and a half year's rent due by plaintiffs to Samuel Young. To this plaintiffs pleaded three pleas, covering the entire sum claimed. The fourth plea to the second avowry began thus:—"And for a further plea "in this behalf to the said second avowry, &c., the said plaintiffs, by "leave of the Court," &c.; and then, in the body of it, covers only part thus, "say, that as to the sum of £74. 8s. 6d. sterling, parcel of the "said rent therein alleged to be due, &c., the said Samuel Young, &c., "ought not to avow, &c., the taking, &c., because they say, that as to "the said sum of £74. 8s. 6d., parcel of the said rent in the said second "avowry, &c., plaintiffs say," &c., and concludes with verification and prayer of judgment.

The third and fourth avowries were similar, with slight variations, as to the quantity of land and the sum due; and the fourth plea to each was similar to that to the second avowry.

Mr. *Hatchell*, Q. C.; with whom was Mr. *Hobart*, for the demurrer. The plea commences as a plea to the entire avowry, and then covers but part. The rule is, that a plea must answer the whole of the plea or count it professes to answer. *Co. Lit.* 303, a; *Askv v. Saunderson* (a); *Woodward v. Robinson* (b). In 1 *Saunders*, 28, all the law is laid down, and several authorities referred to. In a note to the last edition, the editors say, "It has been decided, that where a plea begins "as an answer to part, and contains in the body of it an answer to the "whole, the plaintiff may demur;" and they refer to *Gray v. Pindar* (c). —[CHIEF JUSTICE. The first part of the plea is about the leave of the Court; it is after that it goes to the starting part. Can any one read the first ten lines, and fail to perceive that the plea professes to answer but a part? It would, indeed, be better had it been otherwise.]—But not being so, the plea is bad, as it begins to answer the whole, and answers but a part.—[CHIEF JUSTICE. Yes, if unequivocally so; but if there be a doubt, the Court will struggle against allowing such objections. Would it not have been better to try a special demurrer? JOHNSON, J. Does not the plea also *close* as a plea to the entire? But suppose this £94 were divisible, and that, in separate pleas, the whole was covered, would not each conclude as this does?—I doubt it. In trespass, assault, &c., the old forms began thus—"Defendant, as to so much," &c.; he should specifically describe the particular facts, &c. which he means to cover.

Mr. *J. C. Walker* and Mr. *Napier*, *contra*.—We admit the plea informal, but, at all events, not subject to general demurrer; and they cite *Harvey v. Grabham* (d). Lord Denman's judgment, page 73, is precisely in point. Mr. *Napier* also referred to *Kerrigan v. Newcomen* (e).

CHIEF JUSTICE.—We think, on the whole argument, the demurrer must be overruled.

TORRENS, J.—In the language of the old pleaders, it is a naughty plea.  
Demurrer overruled.

(a) Croq. Eliz. 434.

(c) 2 Bos. & Pul. 427.

(b) 1 Strange, 302. (d) 5 Adol. & Ellis, 61.

(e) 4 Law Rec. N. S. 211.

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*Tuesday, Jan. 21st.*

**PRACTICE—NEW TRIAL MOTION—SUPPLEMENTAL  
AFFIDAVITS.**

**Administrator of KELLY v. DOLPHIN.**

The Court will not allow additional affidavits to be filed by the party making a motion in answer to the affidavit filed to resist the motion; but if, upon hearing the motion, the Court think it necessary, leave will then be granted so to do.

MR. J. D. FITZGERALD applied for liberty to file a supplemental affidavit on the part of the defendant, in answer to the affidavit filed on the part of the plaintiff, to resist the motion for a new trial, and grounded his application upon the special circumstances of the case. The plaintiff, at the trial, impeached a particular document as fabricated, and obtained a verdict on that allegation. The case made by the affidavit of the defendant, to support his motion for a new trial, was directed entirely to disprove the case made by the plaintiff upon the trial; but in the answering affidavits of the plaintiff, he abandons his former case, and sets up one entirely new and inconsistent therewith. The defendant seeks to be allowed to file a further affidavit, undertaking not to put forward any new matter, but to confine it to a denial of the new matter put forward by the plaintiff.

Mr. J. H. Blake, Q. C., resisted the motion.

The COURT refused the application, as contrary to the established practice; but added, that if, upon the discussion of the motion for a new trial, they thought it necessary, they would then give liberty to file further affidavits.

*Wednesday, Jan. 22d.*

**LEASING POWER—CONSTRUCTION—LEASE OF LIVES  
RENEWABLE FOR EVER.**

**JOSEPH SMITH and Wife v. JOHN CLARKE and others.**

*Quere*—Whether a lease of lives, with a covenant for perpetual renewal, be a valid execution of a power to lease (by persons seized of the particular estate under a settlement), "for any term of lives or years consistent with their respective interests therein."

THIS was a case directed by the Court of Chancery, in a suit there instituted between the parties here, for a renewal, for the opinion of this Court, upon the question, whether the indenture of lease and release, and the covenant therein contained for the renewal thereof, dated the 10th day of November, 1783, was warranted by the leasing power contained in the indenture of marriage settlement, or indenture of lease and release, dated the 26th of June, 1781, and executed on the intermarriage of Thomas and Mary Palmer?

By indenture executed on the marriage of Thomas Palmer, jun. and Mary Palmer, dated the 26th June, 1781, several lands, including those of Tubrid, or Tubrit, were conveyed to trustees upon certain trusts, in the usual course of strict settlement, viz., to Thomas Palmer for life, with remainders over. The lands comprised in the settlement were therein recited to be held by the settlor at that time under different tenures, as recited in the settlement:—the lands of Kilbalyskea in fee; other lands under a fee-farm grant; the tolls and customs of the fairs and markets of Shinrone under a Crown grant; Magherymore, Clareen, and others under a lease for the residue of a term of 999 years; part of Carrygotain under a fee-farm grant; and the lands of Tubrid or Tubrit, the lands in question, for three lives, renewable for ever; the remaining lands under a lease for three lives, without a covenant for renewal.

The case stated, that in the said settlement there was the following leasing power:—"Provided also nevertheless, and it is hereby declared "and agreed by and between all the said parties to these presents, that "it shall and may be lawful for the said Thomas Palmer the younger, "and all and every other person or persons to whom any use or estate "is or are hereby limited, when they shall respectively be in the actual "possession of the said towns, lands, and premises, or any of them, by "indenture under their respective hands and seals, to demise or lease "the said lands and premises, or any part thereof, to any person or persons, for any term or number of lives or years, *consistent with their respective interests therein*, to commence in possession and not in reversion, remainder, or expectancy, and so as in every such lease of all or "any part of the said granted and released premises, the best and most "improved yearly rent that can be reasonably had or obtained for the "same, shall be reserved and made payable, without taking any sum or "sums of money or other thing by the way of fine for the making any "such lease or leases, and so as none of the said leases be made dishonourable of waste, and that in every such lease there shall be contained "a clause of re-entry for non-payment of rent to be thereby reserved, "and so as the lessee to whom such leases or lease shall be made do "sign, seal, and execute counterparts of such lease or leases, any thing "herein contained to the contrary notwithstanding."

The said marriage took effect, and there was issue, one of whom, the defendant Mary Clarke, is now alive.

By indentures of lease and release of the 10th November, 1783, the said Thomas Palmer, then tenant for life under the said settlement, demised the lands of Tubrid to Amos Palmer, for three lives therein named (other lives than those for which the settlor held), with a covenant by the said Thomas Palmer, for himself, his heirs and assigns, "That upon the death of the lives in the said indenture named, or any "of them which shall first happen, and upon the said Amos Palmer, his

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"heirs or assigns, within six months after the failure of such life, paying to the said Thomas Palmer, his heirs or assigns, the sum of £5 as a fine for each and every life which shall happen to die, and paying all rent and arrears due, and nominating a new life instead of the person so happening first to die, the said Thomas Palmer, his heirs or assigns, shall or will add such new life in place of the one so failing, and so from time to time for ever upon the failure of each life."

The settlor's interest in said lands of Tubrid was still subsisting, and the case states that the said lease was in all other respects conformable to the leasing power, save that on which the question arose. One of the lives named in the lease of 1783 having died, and the defendants having refused to renew, a bill was filed by the plaintiffs against the defendants in the Court of Chancery, praying for a specific performance of the covenant to renew, which has produced the present case.

Mr. *Wm. Smith*, for the plaintiffs.—The question raised by this case has not yet been the subject of judicial decision. There are two cases very similar, but in which no decided opinions were given by the Court. *O'Brien v. Grierson* (a) was the case of a settlement of a single denomination of land held under one title; consequently the present case is much stronger, as here almost every species of tenure occurs. In that case, the words of the power were, "To lease for any number of years or lives consistent with his interest, at the best," &c. Lord Manners, in his judgment, p. 332, says, "Was this lease made contrary to the power of leasing given by the settlement? Of this I entertain great doubts, so much so, that I would not have decided the cause upon that ground, until I had first taken the opinion of a Court of Law upon it." In *Hackett v. Hobart* (b), the power to lease was, "For any term or terms consistent with the estate or term for which the said lands, &c. shall be then held, all or any part or parcel or parcels thereof, in possession and not in reversion." There is a close resemblance between this and the present case. It was not, however, necessary there to decide the question, the bill not praying a renewal; but Joy, C. B., says, in page 296, "I have not made up my mind whether, upon this power, we ought to decree a specific renewal or not." The present case must, therefore, be determined by the ordinary rules of construction, in the absence of any precise decision on the point. When this case was before the Court of Chancery, the Lord Chancellor expressed himself strongly in favor of the lease, and the case was directed at the suggestion of the defendant's counsel.

Suppose the words, "consistent with their respective interests therein" were omitted, as these are the only restraining words, it can

(a) 2 Ball & B. 323.

(b) 1 Jones, 288.

scarcely be contended but that the party could make leases for any period, and, consequently, he could make the lease in question. In *Musherry v. Chinnery*, particularly reported in the Appendix to the last edition of Sir Edward Sugden's work on *Powers*, the words of the power were, "For any term of lives or years, with or without covenants for renewal." Sir Edward Sugden adopts the opinion of Joy, C. B. most fully, which, although to a certain extent extra-judicial, is entitled to high respect. In observing on that case, Joy, C. B. says, "Nothing can be more extensive; the only limit to the power of disposition is, that he shall not alien the fee, so as to part with the reversion or seigniorial rights."

It will, perhaps, be contended on the other side, that the words, "consistent with their respective interests," according to their strict grammatical construction, must refer to the respective interests of the tenant or tenants taking the particular estates for life. If this be the construction, the power will be altogether unmeaning and inoperative, as it will not confer any right or power beyond that which each tenant for life would have without it. If any rational construction can be given to this power, the Court will adopt it, rather than hold it nugatory. In *Atkinson v. Pilsworth (a)*, Yelverton, C. B., in delivering judgment, lays down the rule with great clearness. He says, "No words in any deed or instrument which may have a significant and operative meaning, without injuring the natural and obvious sense of any other part of the deed or instrument, shall be rejected as nugatory and redundant." Therefore, without rejecting those words, the Court may read "*their*" "*the*;" and it would appear that the latter word must have been intended by the parties, and that "*their*" is a clerical mistake; and the word *interests* may be fairly construed estates, i. e. the estates the subject of the settlement. That the intention may be collected from the recitals, we learn from *Bailey v. Lloyd (b)*. Here the settlement recites the different interests as stated in the case. Almost every variety of tenure is made the subject of settlement; some of the denominations of lands are held in fee, some for lives with covenants for perpetual renewal, one for 999 years, &c. Therefore, *their* should be construed *the*. The lands of Tubrid, held by the settlor for three lives renewable for ever, were, by the lease of 1783, demised for three different lives, with a covenant for perpetual renewal. Had this lease been for the same lives, it would not have been within the power under a different construction from that for which I contend. The tenant for life could not make a lease for seven, or even for one year certain, having power to grant only for his own life the extent of his interest.—[BALL, J. What do you say to that part which prescribes that no fine shall be taken?—That question

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(a) 1 Ridg. P. Cas. 461.

(b) 5 Russ. 330.

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does not arise, as the case states that the lease is in every respect, save as to the length of the term, according to the power. The case of *Luttrell v. Emerson* (a) is, however, quite in point. It is there decided that the words in a power, "*without taking fines*," do not apply to fines for renewal pursuant to a covenant; and in *Taylor v. Hordes* (b), Lord Mansfield held, that renewal fines are part of the annual profits, and equally for the benefit of the remainder-man. They are, in fact, an additional benefit to the remainder-man, as, besides the fines, the best improved rent must be reserved at the time of making the original lease.

Mr. Moore, Q. C., and Mr. Holmes, *contra*.—On the hearing of this cause in Chancery, it appeared that the same question on the same settlement had arisen before Lord Manners, in *Spinner v. Clarke*.—[Mr. Blake. The Chancellor called on Mr. Warren or Mr. Armstrong for the particulars of that case, when, they being unable to give them, his Lordship said he would not give it any consideration. The lands there were in fee.]—There are two questions sent here: one, the validity of the lease, which we cannot controvert—it is not impeached in the pleadings; the other, the validity of the covenant, which we do. This settlement evidently contemplates successive new leases to be made in possession by the tenant for life, while it is contended that the first tenant may make one, binding the inheritance for ever; such a construction is so contrary to the general terms of leasing powers, that unless coerced, the Court will not allow it. The general object of such powers is to secure the interest of the estate and of the successive owners. A power to demise or lease in itself means to lease in possession, *Coppleston v. Hiern* (c); while here, an agreement for future leases is sought under it. Suppose the tenant for life made *only* the covenant for renewal, would that be a due execution of the power? The power does not authorise an assignment which has been made here.—[TORRENS, J. That would be, if the party granted for the lives named in his own lease.]—It is clear the party could not make a lease in reversion or *in futuro*. But it is said he may make a covenant to the same effect. This case is like a demise for 100 years, and a covenant to renew at the end for another 100, which would be clearly a lease in reversion. 2 *Sug. on Powers*, 368, *Lyn v. Wyn* (d). Could it be contended that a fee-farm grant could be made of the lands held in fee?

The true meaning of this power is, that the parties may make leases consistent with their own interest. If the covenant be good on the nomination of new lives within six months, it would be good within six years. The power also requires a clause of re-entry; how can the Court

(a) 3 Law Rec. N. S. 156.

(f) 1 Burr. 121.

(c) 5 M. &amp; S. 40.

(d) Bridg. by Ban. 131.

give effect to that, when the party may not loose his right of renewal for six months or six years after the demise determines? It has been held in this Court and in the Queen's Bench, that a clause of surrender introduced into a lease, and not warranted by the power, vitiates the lease. I do not take the law to be settled on the point, but we have a right to make use of it. *Jack v. Creed* (a). And how does a covenant for renewal differ, when the tenant is not bound to renew? It is said, if the power were without the words, "consistent with their interests," it would authorise any lease; but the contrary is held in *Berry v. White* (b), and *Brumley v. Bettison* (c).

We admit there is not much authority upon this subject. The first case is *O'Brien v. Grierson*, referred to by Sir Edward Sugden in his work on *Powers* (d). It does not appear that in that case there was the special provision which is here respecting leasing only in possession. In *Wyndham v. Holcombe* (e)—[States the case]. There it was held that, under such a power, the lives must be certain and co-existing. If the case of *Spinner v. Clarke* were about the same lands, there would be no difference between the cases: the lands there were Kilbalyskea, part of those in the settlement of 1783. The tenant for life made a lease for three lives, with covenant for perpetual renewal, and on one of the lives dropping, Spinner filed his bill. The single question raised was, whether the power warranted the covenant for renewal? It appears, from the notes of the decree, that Lord Manners thought it did not, and dismissed the bill. That case, it would appear, substantially decides the present.

[Mr. Moore sent for the pleadings in *Spinner v. Clarke*, and it appeared, on looking to them, that timber had been demised, contrary to the terms of the leasing power, which required the lessee not to be punishable for waste.]

The COURT said it was impossible to take that case as an authority.

Mr. Blake, in reply.—It must be admitted, on the other side, that their construction will destroy the power altogether; but the Courts always endeavour to give full effect to settlements, and especially with respect to leasing powers. A doubt once existed on the subject, but the matter was set at rest by Lord Mansfield, in his judgment in *Goodtitle v. Finucan* (f), where he says, "Powers are now a common modification of property in land, and as such, are to be carried into effect according to the intention of those who create them;" and refers to a still older authority,

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(a) 2 Hud. &amp; B. 128.

(b) Bridg. by Ban. 96.

(c) 12 East, 305.

(d) Vol 2, 362, edit. 1836.

(e) 7 T. R. 713.

(f) 2 Doug. 573.

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Lord Holt, in the case of *Winter v. Loveday* (a). Upon this, I might call on your Lordships to exclude the words "consistent with their respective interests;" but it is not necessary, for you can give them a rational construction, and it is this:—There being several kinds of estates, some in fee, some for years, and others held for lives, power was given to make leases consistent with the nature of the interest the settlor had. It is an established principle, that the donee of a power is merely the instrument for effectuating the intention of the parties who create it; he only declares an estate from the original grantor, and that the remainder-man is a mere assignee of the reversion under the statute. *Isherwood v. Oldknow* (b).

It is necessary the words of the power should be taken to have some effect, and for the rest of my argument I will presume it was the intention of the settlor to give some power.

It is said that we must read "their" "the," but I think the word applies to the interests of all the parties; and the tenant for life had the entire interest, though for a limited time, that is, during his life; the law sometimes contemplates the tenant for life as representing the whole estate.

The meaning given to the words, "consistent with their respective interests," is, the whole legal interest of all the parties, reserving a reversion; that, therefore, as to the lands in fee, the tenant for life might grant a lease for any term; and as to those for 999 years, for 900; but that of the lands held by the settlor for lives renewable for ever, there was no authority to lease for any but lives in being. That very point arose in *Hacket v. Hobart* (c), and the same argument was used without effect. There, where a settlement of lands held under a lease of lives renewable for ever, gave power to the tenant for life to demise "for any term, or terms. consistent with the estate or term for which the said lands, &c. shall be then held," it was held that the power authorised a demise for three lives, other than the lives in the head lease; that is, that there could be carved out of the interest of the tenant for life, a good lease to his tenant. The argument is, that the tenant could not do so, but in that case the lease was held good.—[BALL, J. That was at the Equity side of the Court of Exchequer.]—It is admitted the lease here is good at law for the lives in it, but they say the covenant is a fraud on the remainder-man. It is sufficient for me to shew it was not a fraud on the power.

It has been argued, that in a case like this, the Court can deal only with the legal estate, and that although a man may bind his heirs, &c., he cannot bind the remainder-man, and that even an improper covenant

(a) Carth. 429.

(b) 3 M. &amp; S. 382.

(c) 1 Jones, 288.

cannot avoid the lease ; but, I admit, that doctrine is not upheld, and the Courts have said, that if the covenant be a fraud on the remainder-man, the lease was void *ab initio*, *Doe v. Sandham (a)*. But unless the lease be a fraud, it cannot affect the lessee who has given consideration. I go thus far with Mr. *Moore*, that as to the fee-simple property, the tenant could grant for any number of years, reserving a reversion, and the best rent, and so as to the lands held for years, if 1000 years, for 999 ; so, I say, where held for lives renewable for ever, he could grant, and covenant to extend the interest ; and if he might make a lease for any term of the lands in fee, why not exercise a similar right over the lands held for lives ? The covenant does not convey the estate, though it is an agreement for perpetual renewals, and that is no more than the settlor intended. What fraud would it be to make a lease for 99 years of the fee-simple lands, and contract to make a similar lease at the expiration of that ? And what difference between that and our case ? *Wheatley v. Creed (b)*, and the cases of *Peters v. Masham (c)*, *Hamilton v. Royse (d)* and *Doe v. Bettison (e)*, there referred to. Here he could go through each clause in the power, and satisfy the Court respecting it, although it was agreed by the parties that but the one question should be discussed. As to the taking of fines—there is no fine here at the making of the lease, and I broadly aver that such fines as are here reserved are not contrary to the leasing power. *Tuthil v. Adamson (f)*. There is a multitude of cases which bear upon ours ; though I admit this particular point has not been decided ; and unless your Lordships say that there has been a fraud on the power, I say, in the words of Lord Mansfield, you cannot say it vitiates the contract.

*Cur. ad. vult.*

(a) 1 T. R. 705.

(c) 1 Fitzg. 157.

(e) 12 East, 305.

(b) 2 Hud. & B. 128.

(d) 2 Sch. & L. 332.

(f) 3 Law Rec. N. S. 56.

*Friday, January 24th.*

## SETTING ASIDE PROCEEDINGS—PROSECUTION FOR PERJURY.

*COMERFORD v. BURKE.*

MR. MACDONAGH, on a former day, obtained a conditional order to set aside the parliamentary appearance and all subsequent proceedings in

If it appear probable to the Court that the defendant was

not served with process, the Court will, on the affidavit of defendant, that he is ready to prosecute the process-server for perjury, order his affidavit off the file for the purpose ; the costs to abide the event.

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this cause, the writ never having been served, nor having come to the hands of the defendant; and that the alleged service may be deemed a nullity, and to take process-server's affidavit off the file, to prosecute him for perjury.

The facts are as follows:—Defendant was acceptor of a bill of exchange, drawn by one John Prendergast, in 1832, on defendant. The affidavit of defendant stated, amongst other things, that he never received information of any legal proceedings until September, 1839, when he was told of an execution against him at plaintiff's suit, and that there had been judgment against him in Michaelmas Term, 1838, grounded on the affidavit of the process-server, which stated that he served a writ of *capias ad respondendum* in August in that year, on defendant in person, at Binghamstown, county of Mayo. Defendant's affidavit, supported by that of the Roman Catholic Clergyman and several others, distinctly negated the process-server's affidavit, and stated reasons for marking the fact of the defendant not having been at Binghamstown that day. The affidavit also stated that defendant has a good defence upon the merits.

*Mr. Jennings*, to shew cause.—All the proceedings have been regular. The defendant cannot set aside these proceedings until after prosecuting the process-server.

*Mr. Macdonagh*.—The Courts once held, that though defendant swore, negating the service, yet, without an affidavit of merits, they would not grant liberty to the defendant to appear and plead to the declaration; and they also imposed the terms, that the party applying should pay the costs of the judgment and subsequent proceedings: but the recent practice, both in England and Ireland, is quite different, and referred to several English cases: *Johnson v. Smallwood* (a), *Phillips v. Ensell* (b), *Morris v. Coles* (c). The old course led to continual perjury. All the modern cases shew that it is sufficient for the party to swear that he is advised and believes he has a good defence upon the merits, and sufficiently to negative the allegation of service, and that he is ready to prosecute the process-server for perjury. There are several cases in the late reports sustaining this: *Wilson v. Wilson* (d), *Persse v. Johnson* (e), *Smith v. Kellett* (f).

*Per Curiam.*

Let the affidavit of William Malley, the process-server, be taken off the file and hand handed over to the Clerk of the Crown of

(a) 2 Dow P. C. 588.  
 (c) 2 Dow P. C. 79.  
 (e) 1 Jones.

(b) 4 Tyr. 812; 1 Mees. & Ros. 374.  
 (d) Batty, 60.  
 (f) 1 Crawf. & D. 452.

the county Mayo, to enable the defendant to prosecute the said process-server for perjury, defendant undertaking to prosecute him at the next Assizes in and for the county of Mayo, remainder of motion and the proceedings to stand; and that the costs of motion and of the proceedings do abide the event of the prosecution.

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COMERFORD  
v.  
BURKE.

*Thursday, January 30th.*

PRACTICE—DEED OF SUBMISSION—WITNESS'S  
AFFIDAVIT.

SHORTALL v. MORAN.

MR. BREWSTER, Q. C., applied for an attachment against Patrick Moran, for not making an affidavit to verify the deed of submission to arbitration in this cause, or that it may be made a rule of this Court without such affidavit. In this case, an action was pending between the parties, and it was mutually agreed to refer the matter to Thomas Pack, Esq., the Mayor of Kilkenny. Accordingly, a deed of submission was prepared; the execution of it by the plaintiff, on the 14th of June, 1839, was witnessed by Thomas Bibby. He brought it to Patrick Moran, the attorney and brother of the defendant (who also prepared it), to have it executed by defendant. He said, if entrusted to him he would have it done, as his brother had a great dislike to see strangers. It is sworn that the deed is the hand-writing of Patrick Moran; that the signature of the *defendant* is *his* hand-writing; that the matter was carefully discussed before the arbitrator, and that he gave his award last summer, and that this allegation of Patrick, it is believed, was a mere pretext. Notice has been served on the proper parties.

A witness to a deed of submission to arbitration refused to verify said deed by affidavit. Under the circumstances of the case, the deed was made an order of Court without such affidavit.

DOHERTY, C. J.

I do not see that the rule is inflexible requiring the affidavit to verify; suppose the party were dead: if there be any thing unforeseen, the party can come in.

ORDER ABSOLUTE—That the deed of submission, dated the 14th June, 1839, be filed and made the order of this Court; and let petitioner be at liberty to proceed on said deed and order, as if the execution of said deed by John Moran and Oliver Shortall, the executing parties thereto, had been proved by affidavit.

*Friday, January 31st. v*

## SCIRE FACIAS—STATUTE OF LIMITATIONS.

## KELLY v. Heir and Tertenants of CROGHAN.

Judgment of  
Trinity, 1817,  
redocketed in  
1835. *Sci. fa.*  
issued 1831,  
but no further  
proceedings.—  
Liberty given  
to issue ano-  
ther *sci. fa.*

MR. WORKMAN applied for liberty to issue a *scire facias* to revive a judgment of Trinity Term, 1817. The judgment was obtained as of that term against John Croghan, and re-docketed in Trinity Term, 1835. Principal, interest, and costs are still due. In Michaelmas, 1831, this Court gave liberty to issue a *scire facias* against the same parties who are now defendants, for which a writ issued in December, 1831, returnable in January, 1832. Said writ was duly delivered to the sheriff of the county of Roscommon. Plaintiff's affidavit stated, on belief, that all the parties were served, but the writ was never returned; that the sub-sheriff who acted at the time is dead; and that every exertion was made to procure the writ from his representatives. All the particulars are entered in the seal-book, and he referred to *Maziere v. Oldis (a)*.

*Per Curiam.*

Let the plaintiff be at liberty to issue a *scire facias* against the heir and tertenants of John Croghan, without prejudice to any question arising on the 3 & 4 W. 4, c. 27, s. 40.\*

(a) 5 Law Rec. N. S. 295.

\* *Vide Bolton v. Armstrong*, 5 Law Rec. N. S. 37; *Palmer v. Algeo*, 1 Jebb & S. 501; *Graham v. Shaw*, 1 Ir. Law Rep. 373.

## EXCHEQUER OF PLEAS.

*Tuesday, May 28th.\**

Lessee O'SULLIVAN v. M'SWEENY.

## STATUTE OF LIMITATIONS (3 &amp; 4 W. 4, c. 27).—ADVERSE POSSESSION—EJECTMENT.

THIS was an ejectment on the title, brought as of Easter Term 1838. At the trial which took place before Mr. *Richard Moore*, Q. C., at Tralee Summer Assizes for 1838, the lessor of the plaintiff, in support of his title, proved that one *Sylvester O'Sullivan*, commonly called *MacFinin Duffe*, was seized in fee of the Island of *Shankie*, in the declaration mentioned, and died seized thereof, in the year 1809, without issue, leaving the following persons his heiresses-at-law;—his sister, *Mary Anne Brown*, and his four nieces, the daughters of his deceased sister, *Elizabeth O'Sullivan*, namely, *Margaret*, *Ellen*, *Mary*, and *Elizabeth O'Sullivan*. It was also proved that *Margaret* had married the lessor of the plaintiff, *Justin O'Sullivan*, in the lifetime of the said *Sylvester O'Sullivan*, and that *Ellen* had married one *Sylvester O'Sullivan* the younger, and that upon the death of the said *Sylvester O'Sullivan MacFinin Duffe*, the son of one *Richard O'Sullivan* entered upon the Island and became possessed thereof.

There was then given in evidence a judgment in ejectment recovered in the Court of Exchequer in Ireland, in Trinity Term, in the 50th year of the reign of his Majesty, King *George* the 3d, at suit of one *John Jones*, upon the demises following, viz., the demise of the said *Mary Anne Brown*, the demise of the said *Justin O'Sullivan* and *Margaret* his wife, the demise of the said *Ellen O'Sullivan*, and *Sylvester O'Sullivan*, her husband; and the demises of the said *Mary O'Sullivan*, and *Elizabeth O'Sullivan*, by which judgment the said *John Jones* recovered a certain term therein mentioned in the said Island.

The lessor of the plaintiff further gave in evidence, that *Mary Anne Brown* entered into possession of the Island, under, and by virtue of the said judgment, and continued in possession thereof, until the year 1825, when she died leaving *Lucy Brown*, the wife of the defendant *Peter M'Sweeny*, her only child and heiress-at-law. It was admitted that *Mary* and *Elizabeth O'Sullivan* were both married, and that *Margaret O'Sullivan* had died leaving issue, and her husband, the said *Justin O'Sullivan* the lessor of the plaintiff, her surviving.

Adverse possession within the meaning of the 15th sec. of the 3 & 4 W. 4, c. 27, is not an adverse possession for twenty years. *Held*, therefore that a possession for twenty years, without payment of rent or an acknowledgment of title, was sufficient to bar an ejectment brought for the recovery of lands where the possession was adverse at the time of the passing of the act, although such possession had not been adverse for a period of twenty years.

\* Trinity Term.

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The lessor of the plaintiff having closed his case, it was proved on the part of the defendant, that the said Mary Anne Brown had been in the sole possession or receipt of the rents of the Island from 1810 until her death, and that the defendant and his wife had obtained possession thereof upon her decease in 1825, and had exclusive possession for some years past. Under these circumstances, the defendant's counsel contended that the plaintiff's right to recover, was barred by the recent statute of limitations, 3 & 4 W. 4, c. 27.

The learned Judge in charging the jury, informed them, that unless they believed that there had been an actual ouster of the lessor of the plaintiff, by Mrs. Brown, more than twenty years before the day of the demise in the declaration in ejectment, they should find for the plaintiff; and that even if they were of opinion that there had been an actual ouster in the year 1825, they should find for the plaintiff. The jury accordingly found a verdict for the plaintiff.

The case now came before the Court upon a bill of exceptions taken to the Judge's charge.

Mr. *Christopher Coppinger*, for the defendant.—The question in this case is whether, under the 3 & 4 W. 4, c. 27, a possession of twenty years against the lessor of the plaintiff is not a bar, although such possession may not have been adverse prior to the year 1825,—in other words, whether the possession having been adverse at the time of the passing of the act, and the defendants in possession for the full period of twenty years, the plaintiff is not precluded and barred by the words of the 15th section of that statute?—[PENNEFATHER, B. Do you contend that if there had been a possession for twenty years, and only one year of that period adverse, the defendants would now be entitled to rely on the statute as a bar?—Yes, it must be admitted that to support the present exceptions, it is necessary to go the length of contending that one year's adverse possession, provided it had been adverse at the time of the passing of the act, was sufficient to entitle the defendant to the benefit of its provisions. Before the passing of the act, the Courts were particularly strict as to the doctrine of adverse possession, and it was for the purpose of putting an end to the difficult questions that so frequently arose with respect to the nature of that possession, that the act itself was passed. It is plain that by the operation of the statute, that possession became adverse,

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\* 3 & 4 W. 4, c. 27, s. 15. "Provided also, and be it further enacted, that when no such acknowledgment as aforesaid, shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, herein before limited, shall have expired, make an entry, or distress, or bring an action to recover such land or interest, at any time within five years next, after the passing of this act."

which had not been so previously ; for instance, an exclusive possession for twenty years without payment of rent, or a written acknowledgment of the right, was made a bar to the recovery of the possession. Unless the plaintiff here can bring himself within the saving in the 15th section, his right is altogether barred.—[PENNEFATHER, B. As the obvious policy of the act was to intermeddle as little as possible with existing rights, would it not appear to have been the intention of the legislature to provide a period of five years, commencing from the time of the passing of the act, within which parties might contest their rights in every case where there had not been such an adverse possession, as, under the pre-existing state of the law, would have barred those rights ? A different construction would give the act an *ex post facto* operation.]—If the terms adverse possession in the 15th section be taken to mean an adverse possession for twenty years, they would be altogether useless and of no effect, for an adverse possession for twenty years was sufficient to bar the right under the law as it already stood. The construction contended for on the part of the defendant is productive of no injustice, even in the case of an adverse possession but for a single year before the passing of the act, for in such a case the party had five months within which he might have brought his action, viz., from the 24th of July, 1833, until the 31st of December following. During that interval, it may be fairly inferred, that the legislature intended that all actions should be brought in those cases in which the possession was adverse at the time of the passing of the act, however short that adverse possession may have been. What was adverse possession at the time of the passing of the act was to be decided by the old law, and almost invariably the old law required proof of an actual ouster to support a case of adverse possession. The 15th section was intended to provide for those cases where the possession had not the character of adverse up to the period of the passing of the act, but where by its operation the possession would acquire that character on the very day it passed. In such cases, five years were given to the party to assert his right. Such is the view of the statute taken in *Hayes on Conveyancing*, 4th ed. p. 217. The true meaning of the words adverse possession in the 15th section is that which the defendants here contend for, namely, that it has no reference to length of time, but to the simple question of fact, was there, or was there not, an adverse holding of the lands on the day upon which this act passed ? This very question arose in a recent case, *Nepean v. Doe d. Knight (a)*, and the Court were there of opinion, that the construction now contended for was in accordance with the true meaning of the act. It must be assumed, from what appears upon the bill of exceptions, that the possession of the defendant was adverse from 1825. Inasmuch, therefore, as

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(a) 2 Mees. & Wels. 894.

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he, or those under whom he derives, were in possession more than twenty years, he is entitled to have the exceptions ruled in his favor, and the verdict consequently set aside.

Mr. *Freeman* and Mr. *Hickson*, Q. C., for the lessor of the plaintiff. There is no evidence upon the bill of exceptions of there having been an actual ouster, which is very material, when the Court comes to consider the state of the law before the recent statute of limitations. On the contrary, it appears that it was upon the demise of the lessor of the plaintiff, as well as upon that of Mary Anne Brown, that the latter recovered in the ejectment, and entered into possession. It was a settled rule of the old law, that in the case of co-parceners, joint-tenants, and tenants in common, the possession of one was the possession of all. The possession of one co-parcener was that of the other, so as to create a seisin in the other, and carry her share by descent to her heirs, although the other had never actually entered, *Doe v. Keen* (a); Co. Litt. 15, a. Where one tenant in common levied a fine of the whole estate, and received the rents for nearly five years afterwards, without account, it was held not sufficient to warrant a direction to the jury, against the justice of the case, to find an actual ouster of the companion, so as to require an actual entry to avoid the fine; *Peaceable d. Hornblower v. Read* (b). The authorities are all collected in the case of *Lessee Dowdall v. Byrns* (c). In *Reading v. Rawsterne* (d), the statute of limitations was held to be no bar without actual disseisin.

The 15th section of the 3 & 4 W. 4, c. 27, had in contemplation that class of cases, which shews that under the old law, twenty years' possession was not sufficient to bar the rights of a party situated as the lessor of the plaintiff, unless there had been an actual ouster or disseisin. In *Fairclaim v. Shackleton* (e), the bare receipt of rent for twenty-six years by one tenant in common, without accounting for it to the other, was held no evidence of ouster. *Reading v. Rawsterne*; Co. Litt. 195, b; 243, b; *King v. Scrape* (f), are authorities establishing the same proposition. That the view of the 15th section thrown out by one of the Court is the correct one, appears from the case of *Doe d. Davis v. Williams* (g).—[PENNEFATHER, B. There was no adverse possession in that case.]—There was none in this.—[RICHARDS, B. Very likely not; and if that question had been left to the jury, they would, probably, have found that the possession by the defendant in 1825, did not amount to an adverse possession; but no such question was left to

(a) 7 T. R. 386.

(c) Bat. 373.

(e) 5 Burr. 2604.

(b) 1 East, 568.

(d) 2 Lord Raym. 829; S. C. 2 Salk. 423.

(f) 2 Espin. 434.

(g) 5 Ad. & El. 291.

them.]—There was no evidence of any adverse possession whatsoever in this case, as Mrs. Brown took possession of the Island, as we allege, merely as our agent.—[RICHARDS, B. Suppose that at the time of the passing of the act, there had been an adverse possession of 19 years and 364 days,—can it be contended that it was the intention of the legislature, by the 15th sec., to extend the time in such a case beyond the period of twenty years, which would have been a bar under the old law, by giving the party an additional period of five years within which to bring his action?]—In the case of *Doe v. Thompson* (a), Mr. Justice Patteson thus expresses himself with regard to the 15th section:—"I do not mean to say that the twenty years must have expired since the passing of the act. Section 15 applies to persons who have been in possession so long that, if their possession had been adverse, they would have acquired a title, but who have held under such circumstances, that the doctrine of non-adverse possession would have prevented such a title from accruing. In those cases, the right of action now subsists, by section 15, for five years next after the passing of the act. I think, to make that section applicable, there should have been a continuance in possession of the person who was in for twenty years."—[RICHARDS, B. That is precisely my view of the 15th section.]—The above observations of Patteson, J. are exactly descriptive of the circumstances under which the possession was held in the present case; and such, also, is the view taken by Mr. Hayes in the passage which has been referred to (b). The object of the recent act was, to get rid of the difficulties occasioned by the vague and indefinite character of that which was held to constitute an adverse possession under the old law, and to remove the uncertainty created by such cases as *Doe v. Prosser* (c) and *Fairclaim v. Shackleton* (d). Mr. Hayes, in the book above quoted, p. 237, says:—"It has been observed that, under the old law of limitations, it was sometimes very difficult to pronounce any possession adverse."

But whatever may be the meaning of the words adverse possession in the 15th section, as there was no evidence of there having been either adverse possession or an actual ouster, this case must fall within that section, and the lessor of the plaintiff had therefore five years from the passing of the act to bring his action.

Mr. Collins, Q. C., in reply.—The statutes of limitations are statutes of repose, and it would be defeating their beneficial enactments if long possessions were allowed to be evicted (e). Any twenty years' possession, whether adverse or not, is now a bar, except in cases within

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(a) 6 Ad. & El. 731.

(b) p. 217.

(c) Cowp. 217.

(d) 5 Burr. 2604.

(e) *Fide Stauell v. Lord Zouch*, Plowd. 572.

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the 15th section ; and unless the lessor of the plaintiff can bring himself within that section, his right is barred by the second and third sections ; but he has not done so. If there was no evidence of adverse possession, the plaintiff's counsel should have taken the objection at the trial ; but the fact of there having been such adverse possession must be taken as conceded on the bill of exceptions.

This act should receive a construction analogous to that given to Lord Tenterden's Act (9 G. 4, c. 14), which was construed as having, to a certain extent, a retrospective operation. But the case of *Nepean v. Doe d. Knight*, is quite conclusive upon the principal question here. Lord Denman, in that case, says :—"The 15th section applies only where the "possession was not adverse according to the former state of the law at "the time of the passing of the act, that is, the 24th July, 1833. If "that point had been raised at the trial, it is plain the jury would have "been satisfied that the possession was adverse on that day."

#### PENNEFATHER, B.

I was at first disposed to think, that the legislature intended by the 15th section, to give every person who had a right at the time of the passing of the act, a period of five years for the assertion of that right ; but, upon further consideration, I do not think that such was the intention of the legislature. The 15th section applies only to those cases in which there was no adverse possession *at the time of the passing of the act*. That does not mean an adverse possession for 20 years ; but, in my opinion, an adverse possession for any period, however short, previously to the passing of the act, would be sufficient to oust a party from the benefit of that section. In such a case, the party was not without his remedy, for, as it has been said, he had five months, within which he might have brought his action, viz., from the 24th of July, 1833, until the 31st of December following. During that interval, he might have taken the necessary steps to enforce his rights. The 2d and 3d sections of the act had not then come into operation, and the party was consequently at liberty to proceed as if the act had never been passed.

This construction may unquestionably lead to hardships in individual cases ; but those who framed the statute, no doubt, conceived that such consequences would be more than counterbalanced by the advantages to be attained by quieting possession, and putting an end to that species of non adverse possession so common in cases of this description. The case of *Nepean v. Doe d. Knight*, which has been cited in support of the view of the statute contended for by the defendants, seems to be an authority precisely in point, at least so far as the opinion of Lord Denman goes. I agree in thinking, that in construing this act, an analogy may be derived from the construction given to Lord Tenterden's Act, which, to a certain extent, was permitted to have an *ex post facto* operation.

RICHARDS, B.

I retain the opinion I formed early in the argument, and see no reason to change it. The case of *Nepean v. Doe d. Knight* (a) is an authority that quite sustains the view I was originally disposed to take. The policy of the act of the 3 & 4 W. 4, c. 27, was to make a possession of twenty years confirm a title, subject to certain exceptions. One of those exceptions is, where there has been an acknowledgment in writing; the other, where the possession, at the time of the passing of the act, was not adverse—and, in such cases, it was accordingly considered, that the parties should have five years for the recovery of the land or interest claimed.

This was done in order to prevent that which was a permissive occupation before the passing of the act, being at once converted, by its operation, into an adverse possession. But in that very provision of the act, it is to be observed that there is an express exception as to those persons against whom there had been an adverse possession at the time of the passing of the act.

The counsel for the plaintiff appear to me to have fallen into a mistake, by supposing that the word "adverse," as used in the 15th section of the act, and applied to parties in possession of land at that time, can only be satisfied by attributing to it a meaning much more extensive than the words or subject matter of the section require. Speaking of adverse possession in the 15th section, the legislature expressly and emphatically confined the words to the time of the passing of the act. The words are—"Shall not, at the time of the passing of the act, have been adverse to the right or title of the person claiming to be entitled thereto." To hold that the adverse possession contemplated by the legislature must mean an adverse possession for twenty years preceding, would manifestly be departing altogether from the letter of the act, and I confess I am at a loss to see the reason or necessity for so doing. Parties whose titles were complete at the time of the passing of the act, by twenty years' adverse possession, were not in the contemplation of the legislature at all; at least, there was no intention or design to make any change in the law as against persons so circumstanced; the change made and intended by the act was the other way. It would not only be unnecessary, but absurd, therefore, in my opinion, to enact that those persons who were barred by force of the law as it stood before the statute, should not have five years to proceed, after the statute, for the establishment of their rights or claims, they having no color of claim whatsoever at the time of the passing of the act. But in respect to persons who had rights up to the passing of the act, but whose rights were made the subject of the act, and were affected by its provisions, it

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was quite just to give to such persons a reasonable period after the passing of the act, to avail themselves of the law as it stood before the statute, so as to prevent the statute, which, to a certain extent, operated retrospectively, from working an injustice. The legislature thought it fit, however, not to give such a privilege to persons claiming against parties who had not given any acknowledgment in writing, such as contemplated by the 14th section, and who were in the possession of the land at the time of the passing of the act, adversely to the right of the party so claiming to be entitled thereto. This, in my opinion, is the true reading of the 15th section of the act: and that, I think, is clearly shewn by the instance I put to the plaintiff's counsel in the course of the argument, namely, suppose an adverse possession for nineteen years immediately preceding the passing of the act, can it be contended that the operation of the act was to give an additional period of five years within which proceedings might be instituted? In my opinion, such a construction cannot be contended for: it would have the effect of extending, instead of restricting the period of limitation prescribed by the ancient law.

Exceptions allowed, the verdict obtained by the lessor of the plaintiff set aside, and a *venire de novo* awarded, without costs.

—◆—  
*Monday, November 11th.*

**TRESPASS FOR MESNE PROFITS—CONCLUSIVENESS  
 OF JUDGMENT IN EJECTMENT—AFFIDAVIT OF  
 SERVICE—EVIDENCE—ESTOPPEL.**

**Lessee ARMSTRONG v. NORTON.**

In an action of trespass for mesne profits, in which the general issue only is pleaded, the judgment in ejectment is conclusive evidence of the plaintiff's title, whether that judgment has been obtained on verdict or by default.

**TRESPASS** for mesne profits. The declaration, in addition to a count in the ordinary form for breaking and entering the plaintiff's dwelling-house, and expelling her therefrom, &c., contained a count for pulling down and damaging certain fixtures therein.—Plea not guilty.

On the trial before Mr. Justice JOHNSON at the Mullingar Summer Assizes in 1838, the plaintiff produced and proved attested copies of

Where an action of trespass for mesne profits is brought against a party who has let judgment go by default in the ejectment, an attested or examined copy of the affidavit of the service of the ejectment, is sufficient evidence of the fact of such service in the action for mesne profits.

the judgment in ejectment, of the affidavit of service upon the defendant, and of the writ of *habere*. It appeared that judgment had been obtained against the casual ejector, and that the *habere* had been executed. It farther appeared that the defendant had paid rent to the plaintiff, and that he had been duly served with the notice to quit, upon which the ejectment had been brought. The only evidence that was given of the defendant's having been served with the ejectment was the production and proof of the attested copy of the affidavit of service.

In order to defeat the plaintiff's title to the premises in the declaration mentioned, the defendant attempted to prove title in a person of the name of Dowell, by shewing that Dowell held under the plaintiff, and that the rent which had been paid by the defendant to the plaintiff, had been paid on account of the head-rent payable to the latter by Dowell out of the premises in question. The learned Judge left the case to the jury to ascertain the amount of the dilapidations, but told them that he considered the judgment in ejectment, according to the evidence given, as full evidence of title between the plaintiff and the defendant in the present action.—Verdict for the plaintiff.

A conditional order had been obtained in a former term to set aside the verdict, upon the ground of the misdirection of the learned Judge. The Court granted the order principally upon the authority of the case of *Doe v. Huddart (a)*.

Mr. *W. H. Griffith* for the defendant, now moved to make the order absolute. The misdirection of the Judge was his telling the jury that the judgment in ejectment was conclusive or full evidence of the plaintiff's right to recover, notwithstanding the evidence the defendant had produced of title in Dowell. But the judgment in ejectment is not, under any circumstances, conclusive evidence of title in the lessor of the plaintiff in an action of trespass for mesne rates; *Doe v. Huddart (a)*. Baron Bolland, who delivered the judgment of the Court in that case, says, "In *Goddart's Case (b)*, it is laid down, that, although "in pleadings the obligee cannot allege delivery before the date, because "he is estopped from taking an averment against any thing expressed "in the deed, yet the jurors, who are sworn to try the truth, shall not "be estopped." He also asks, "If the jury are sworn to try the issue "in this case, why is the effect of their oaths to be different in the "trial of an action of this description, from its effect in any other?"—[PENNEFATHER, B. In that case there was a special plea, and the plaintiff had an opportunity of replying the judgment in ejectment by way of estoppel. But, according to the practice in this country of pleading

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(a) 2 Cr. M. &amp; R. 316.

(b) 2 Rep. 4. b.

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the general issue in an action for mesne rates, and not pleading specially, the plaintiff has no opportunity of replying the estoppel. He would, therefore, be deprived of the benefit of it altogether, unless he were at liberty to rely upon it in evidence as conclusive upon the question of title. During the whole course of my experience, and I believe ever since the case of *Aslin v. Parkin* (a), which has been considered as good law for a period of seventy years and upwards, the judgment in ejectment has been invariably held in this country, at least, as conclusive evidence of the title in an action for mesne rates, whether that judgment had been obtained upon a verdict or by default, the case of *Aslin v. Parkin* having established that a party who is served with the ejectment is *quodam modo* a party to the record. It appears to me, that an answer may be given to the question put by Baron Bolland in the case of *Doe v. Huddart*. Admitting that a judgment, generally speaking, is not conclusive unless pleaded as an estoppel, where a party has had an opportunity of so pleading, I would say, there is a distinction between the action of trespass for mesne profits and other actions. An action of ejectment is brought in fact to recover possession of the land, but in form also to recover compensation for withholding the possession, and accordingly for some time, damages for withholding the possession of the land were recovered in the ejectment, as well as the land itself; but that was found inconvenient in practice, inasmuch as it induced the necessity of being prepared to prove not only title to the land, but the value of the intermediate profits, a portion of proof that the event of the action might render unnecessary. Therefore, for convenience sake, a second action was substituted for the recovery of the mesne profits—but always considered as connected with, and as forming a continuation of the ejectment, and so it was held that the parties to the second action could not litigate or contravert the title which had been determined by the first. The action of trespass for mesne rates, is, therefore, not altogether a separate or distinct action, but is consequential to, and dependant on the action of ejectment,—connected with, and ancillary to it. This distinction between the present and other actions seems to me not to have been sufficiently attended to in the judgment in the case of *Doe v. Huddart*, which is put entirely on general principles of pleading. For these reasons, I own, it would require a great deal to convince me of the propriety of overruling a course which for so many years has prevailed in Ireland, and which has been found so salutary and useful in its operation.]—It has been decided, and it cannot be disputed, that in actions of trespass, a verdict or judgment in a former action, which, if pleaded in bar, would be an estoppel, when given in evidence under the

(a) 2 Burr. 668.

general issue is not conclusive, but only evidence to go to the jury; *Vooght v. Winch* (a); *Outram v. Morewood* (b). If the party chooses to rely on a former judgment, he must plead it in bar, and say that the other party is not at liberty to call on him to answer again. If, however, he declines that mode of defence, and submits the case to the jury, they are to say, not whether there was a former action for the same cause, but whether the plaintiff has not a ground of action as he alleges in his present declaration; and when the matter is submitted to the jury to find what the fact is, it is inconsistent with the issue which is joined between the parties to say, that the jury are estopped from going into the inquiry; per Holroyd, J., in *Vooght v. Winch* (c). In *Doe v. Huddart*, the defendant pleaded, first, the general issue, and, secondly, that the premises were not, nor was any part thereof, the premises of the plaintiff, as in the declaration mentioned, *concluding to the country*. The plaintiff, therefore, in that case had no opportunity of replying the estoppel in consequence of the conclusion of the pleas, and that very argument was urged by counsel and assented to by the Court. *Doe v. Huddart* is recognised in *Smith's Leading Cases*, in the note to *Aslin v. Parkin* (d); and in the last edition of *Phillips on Evidence* (e). It is also recognised in the cases of *Doe d. Strode v. Seaton* (f), and *Joliffe v. Monday* (g).

But independently of the above, there is another objection which disentitles the plaintiff to a verdict. It was not proved in the present case that the defendant had been served with the ejectment, the only proof which was offered of that fact being the production of the attested copy of the affidavit of service, which is not evidence; but the party who served the ejectment should have been produced. In the case of an ejectment for non-payment of rent, it is true, the affidavit of service is received to shew the fact of such service, and the reasons of that anomaly (for such it is) are explained by O'Grady, C. B., in *Lessee Stuart v. Smith* (h). He says "Neither the 11th of *Anne* nor the 4th *Geo.* 1, require any affidavit of this service, nor under those acts could any such affidavit have been received as proof of it: and this upon first principles. Then, why now is it received to shew the fact of such service? The 8 *Geo.* 1, will clearly shew why; and why no other evidence of it will be sufficient. The 1st section enacts, that 'If any person or persons shall, after affidavit made of such service, take defence in such ejectment,' &c. 'then the landlord, on making the residue of the proof required, shall recover.' What then lets him in to do so? Why the appearance of the defendant after affidavit of due service filed."

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(a) 2 B. &amp; Ald. 662.

(c) 2 B. &amp; Ald. 671.

(e) 8th ed. pp. 512, 616, 840.

(j) 4 Mees. &amp; We's. 502.

(b) 3 East, 346.

(d) 1 Vol. p. 268.

(f) 2 Cr. M. &amp; R. 728, 731, 732.

(h) Batty 317.

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And in *Hawkshaw v. Sutter* (a), the Court of King's Bench held that as proof of title, an affidavit could not be received at the trial, because the witness himself should in that case be called.

PENNEFATHER, B.

Such evidence has been always held sufficient in this country. In actions of trespass for mesne profits, it has been the constant course to prove the service of the ejectment on persons who have not taken defence, but who thus become *quasi* parties to the record, by the attested and compared copy of the affidavit of service; and this course is recognised by the statutes regulating ejectments for non-payment of rent, and is the evidence uniformly given on trials of such ejectments.\*

It eventually became unnecessary to determine the question with respect to the conclusiveness of the judgment in ejectment, no objection appearing from the learned Judge's notes to have been made on that ground at the trial.

On the following day, BARON PENNEFATHER seeing Mr. *Griffith* in Court, made the following observations in reference to the preceding case:—Upon the discussion which took place yesterday, as to how far the ejectment was to be considered conclusive in the action of trespass for mesne rates—it was contended on the part of the defendant, that it could not be held conclusive unless it were pleaded as an estoppel, and for that proposition the case of *Doe v. Huddart* was relied on. In that case there was a plea of the general issue, and a special plea that the premises in question were not the property of the plaintiff, and it was said by Mr. *Griffith*, that because the latter plea concluded to the country, the plaintiff was precluded from replying the estoppel, but I cannot concur in that proposition, as I am of opinion that he might have replied the judgment as an estoppel notwithstanding such conclusion of the plea. In an action of trespass for mesne rates in the common form, when the defendant pleads the general issue, the plaintiff has no opportunity of relying upon the judgment as an estoppel in pleading, and unless he were at liberty to rely upon it in evidence, he would have no means of availing himself of the estoppel at all. The observations of C. J. Tyndal, in the recent case of *Magrath v. Hardy* (b), are here very deserving of consideration. His Lordship there says, in reference to the subject of estoppels, "The law on this point is laid down with "great distinctness in the case of *Trevivan v. Lawrence*, (c): 'The

(a) Batty 319.

(b) 4 Bing. N. C. 798.

(c) 2 Lord Raym. 1048, S. C. 1 Salk. 276.

\* See Smith and Batty, 484, *note*, and Longfield's Law of Ejectment, 248.

" 'Court,' is is said, 'took this difference, that where the plaintiff's title  
 " 'is by estoppel, and the defendant pleads the general issue, the jury  
 " 'are bound by the estoppel, for here is a title in the plaintiff, that is a  
 " 'good title in law, and a good title if the matter had been disclosed and  
 " 'relied on in pleading; but, if the defendant pleads the special matter,  
 " 'and the plaintiff will not rely on the estoppel when he may, but takes  
 " 'issue on the fact, the jury shall not be bound by the estoppel, for  
 " 'then they are to find the truth of the fact which is against him.  
 " 'Thus in debt for rent on an indenture of lease, if the defendant plead  
 " '*nil debet*, he cannot give in evidence, that plaintiff had nothing in the  
 " 'tenements; because, if he had pleaded that specially, the plaintiff might  
 " 'have replied the indenture and estopped him: but if the defendant  
 " 'plead *nil habuit*, &c., and the plaintiff will not rely on the estoppel,  
 " 'but reply *habuit*, &c., he waives the estoppel and leaves it at large,  
 " 'and the jury shall find the truth notwithstanding the indenture.'"  
 These observations are directly applicable to the action of trespass for  
 meane rates in Ireland, in which it has been always customary to plead  
 the general issue only; it is, therefore, satisfactory to think that the  
 course of practice which has been so long pursued in this country in  
 relation to this action, may be upheld upon the established principles of  
 pleading, without at all trenching upon the decision of the Court of  
 Exchequer in England in the case of *Doe v. Huddart*.

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Monday, November 25th.

PRACTICE—PRISONER—PRIVILEGE FROM ARREST—  
 PERMISSION TO LODGE DETAINER.

BUCKMASTERS v. COX.

In this case, a conditional order had been obtained, that the defendant  
 should be discharged out of custody of the sheriffs of the county of the  
 city of Dublin, under the *capias ad satisfaciendum* at the plaintiffs' suit,  
 and from all subsequent detainers, if any.

The defendant was arrested at his house in Cheshire on the 2d of  
 October last, on a charge preferred against him by a person of the name  
 of Dawson, resident in Dublin, of having uttered and passed a forged  
 promissory note, knowing the same to be a forgery, to the said Dawson,

Where a party  
 was in custody  
 on a criminal  
 charge, which  
 was abandon-  
 ed, but previ-  
 ously to his  
 discharge from  
 such custody,  
 a detainer in a  
 civil action  
 was lodged  
 with the she-  
 riff—

*Held*, that under such circumstances he was not privileged from detainer and arrest.

Where a person is in custody of the *sheriff* on a criminal charge, it is not necessary to  
 obtain an order of the Court for the sheriff to detain him in a civil suit.

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in payment of a carriage purchased from him by the defendant. The defendant was brought over from his residence in England in custody of a police constable, and committed to the gaol of Newgate, where he was kept in confinement until the opening of the Commission of Oyer and Terminer, on the 26th of October.

The prosecution having been abandoned, the defendant was brought up from the gaol on the first day of the Commission, and ordered by the Court to be discharged in the usual manner by proclamation; but immediately on being liberated from the dock, he was taken in execution by the under-sheriff upon the writ of *ca. sa.* which had issued at the suit of the plaintiff in this case. The sheriff, accompanied by the keeper of the prison, conducted the defendant back to gaol, where he had been since detained under a warrant on the said execution.

The conditional order was obtained upon an affidavit of the defendant, stating the above facts, and alleging that no order had been obtained by the plaintiffs for liberty to lodge a detainer against the defendant, while in such criminal custody.

The plaintiffs' attorney made an affidavit in reply, in which he admitted that no order had been obtained for liberty to detain the defendant, inasmuch as the execution had been issued and lodged with the sheriff long prior to the time of the defendant's being brought up in custody upon such criminal charge.

Mr. Rolleston, with whom was Mr. Rogers, for the defendant, now moved to make absolute the conditional order for the discharge of the defendant. The defendant having been brought within the jurisdiction of the Court by means of a criminal charge, was about to be released from custody, when he was detained under the *ca. sa.* in this case. Under such circumstances, it is clear from the cases of *Callans v. Sherry* (a), and *Kelly v. Barnewall* (b), in the Queen's Bench, and from the case of *Babington v. Mahony* (c), in this Court, that he is entitled to his discharge.

2d. The plaintiff should have obtained an order of the Court for liberty to lodge a detainer, the defendant being in custody on a criminal charge, in which case both Courts hold it necessary to obtain the leave of the Court to charge a defendant in a civil action; *Cleary v. Kean* (d); *Rex v. Torrens* (e); — v. — (f). The application is properly made to this Court, being that out of which the civil process issued; *Rex v. M'Loughlen* (g).

(a) Alc. & Nap. 125.

(b) Cooke & Alc. 94; and see *Williams v. Steele*, 4 Law Rec. 1st Ser. 169.

(c) 5 Law Rec. 2d Ser. 232, n.; and see *Wallace v. Murphy*, id. 231.

(d) 1 Law Rec. 2d Ser. 47.

(e) Id. 174.

(f) 5 Law Rec. 2d Ser. 233, n.

(g) Alc. & Nap. 130.

Mr. *Gibbon*, with whom was Mr. *Hatchell*, Q. C., *contra*.—In *Goodwyn v. Lordon* (a), it was held, that a party who had been detained upon a criminal charge, and tried, acquitted and discharged, was not privileged from arrest during his return home from the gaol in which he had been confined.—[PENNEFATHER, B. That case seems very similar in its circumstances to the present.]—In *Babington v. Mahony*, the case of *Goodwyn v. Lordon* was brought under the consideration of the Court; but the best report of it, from which it appears that it was fully and maturely considered, was not cited. *Kelly v. Barnewall*, *Williams v. Steele*, *Callans v. Sherry*, and *Babington v. Mahony*, were all cases in which the prisoner was bound to attend the Court under his recognizance; and in *Callans v. Sherry*, the Court said, “There are many cases where parties are compelled to attend Courts of Justice under a penalty, as in the case of jurors or prosecutors under recognizances; and where parties are thus obliged to attend, the Court will grant them protection going and returning.” There is no case from which it appears that a prisoner, brought into Court under an arrest upon a criminal charge, has been held entitled to this privilege. In such a case, his appearance is compulsory, and he has done nothing to entitle him to it.

2d. Upon the other point, as to the necessity of obtaining the leave of the Court to lodge a detainer, the case of *Grainger v. Moore* (b) shews such permission to be unnecessary. That was an application for liberty to detain a party in custody of the sheriff on a criminal charge, but Lord Abinger and the Court of Exchequer held that it was not necessary to procure an order for that purpose.

PENNEFATHER, B.

There seems to be a plain distinction between the case of a party coming in, pursuant to his recognizance, to attend a Court of Justice, and in performance of a public duty, and the case of a party being apprehended on a criminal charge and detained in custody, and who has done nothing in furtherance of the ends of justice.

With respect to the practice which has prevailed, of requiring, in every case, the permission of the Court before a detainer can be laid on a party in custody of the sheriff upon a criminal charge, it is questionable whether such a practice may not have been adopted, without attending sufficiently to the reason why such permission has been held necessary where the defendant was in the custody of the Marshal of the Queen's Bench. This is a case well deserving of consideration, and we will look into the authorities upon the subject.

(a) 3 Nev. & Man. 879. S. C. 2 Dowl. Pr. Cas. 504; reported also *nomine Goodman v. Lordon*, 1 Ad. & El. 378.

(b) 5 Dowl. Pr. C. 456.

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On the following day, the cases of *Pearson v. Yewens* (a), *The King v. Torrens* (b), and *Lynch v. Torrens* (c), and the note to the last-mentioned case, referring to *Freeman v. Weston* (d), were mentioned to the Court by Mr. Rolleston.

PENNEFATHER, B.

This is a case of considerable importance, and some decisions, if not contradictory to each other, at least apparently so, have been made on the subject. From some of those cited, this case is clearly distinguishable; with respect to others, it is not, perhaps, so easy to draw the line of distinction. The defendant here was originally arrested upon a charge of forgery, and brought from his place of residence in Chester, to stand his trial in this country. It appears that the prosecutor in that case was totally unconnected with the plaintiff in the present action. The defendant being so in custody, and no bills of indictment having been found by the Grand Jury, it was ordered by the Commission Court that the defendant should be discharged by proclamation in the ordinary way. However, before his discharge actually took place, the detainer in this action was laid on by the sheriffs, by virtue of a writ of *capias ad satisfaciendum* issuing out of this Court; and he now applies to be discharged from this arrest. There can be no doubt, that the writ having issued from this Court, the application may properly be made to it, although I by no means say, that the Commission Court might not also have taken cognizance of the matter, in the same manner as that Court could have discharged a juror or a witness who had been improperly arrested upon process issuing out of another Court.

This Court, however, having jurisdiction to examine whether its process has been properly executed, we are to consider whether, in this instance, the process was properly executed, and whether the defendant, in consequence, ought to be discharged?

The application is rested upon two grounds:—First, that no party in custody under a criminal charge is liable to be detained by virtue of a writ in a civil action. With regard to those cases in which the party ordered to be discharged had attended the trial in pursuance of a recognizance, they are clearly distinguishable from the present. The defendants had been severally liberated upon bail, and their recognizances taken to abide their trials, and they, in fulfilment of their obligations, came into Court in furtherance of the ends of justice. Both this Court and the Court of Queen's Bench were of opinion, that parties coming in under such circumstances, were in a position similar to that of jurors and witnesses summoned to attend the Court, and were conse-

(a) 5 Bing. N. C. 489.

(c) 2 Law Rec. 2 Ser. 34.

(b) 2 Law Rec. 2 Ser. 28.

(d) 1 Bing. 221.

quently, in like manner, entitled to be protected; that the protection ought to continue *eundo morando et redeundo*, and that such protection was necessary for the ends of justice. But the case of a party in actual custody under a criminal charge is very different. He does no act to further the ends of justice—he is detained by the arm of the law against his will—and, above all, there is no obstruction, or danger of obstruction to public justice by his detention under civil process, for he is already in custody, and if he were to be protected from such detainer, he might thus gain immunity from civil arrest by his own criminal misconduct, and to an extent much beyond what a party entering into a recognizance could claim, for he is not protected during the whole period that may elapse before his trial, but during that portion of it only which he employs in furtherance of public justice—namely, while he is going to and returning from the Court in which he is bound to appear and abide his trial; but as to a party taken and detained on a criminal charge, who may have offended against, but has not done any thing to aid the administration of the law, there exists no necessity that he should have, and, in my mind, he has no privilege. This has been expressly decided in the case to which we have been referred, of *Goodwyn v. Lordon*, reported in 3 *Nev. & Man.* 879, 2 *Dowl. Prac. Cases*, 504, and 1 *Adol. & Ellis*, 378; and the same principle is to be collected from many of the cases cited in the course of the argument. In all of them, with, I believe, the exception of *Wallace v. Murphy*, in the Queen's Bench, and the anonymous case in this Court, reported in 5 *Law Rec.* 2 Ser. 231, and the note, it is assumed that a civil detainer might be laid on a person in custody under a criminal charge, though in some it appears to have been thought necessary that the leave of the Court ought to be obtained previously to the arrest under the civil process: and this seems to have been an opinion that very generally prevailed.

I apprehend that this opinion derived its origin from those cases in which the defendant was in custody of the Marshal of the Queen's Bench, the prison of that Court, and in which, therefore, an application to that Court was deemed necessary as a courtesy, for intermeddling with its prisoner.

That this is the true reason of the practice, appears further from the case of *Grainger v. Moore* (a), decided in 1837 by the Court of Exchequer. In that case, the defendant being in the custody of the sheriff, an application was made to the Court of Exchequer for an order to the sheriff to detain him on a writ of *capias* issued at the suit of the plaintiff. Lord Abinger stated that he saw no necessity for any such order. Being pressed, however, by the assertion that it was the common practice to obtain such orders, his Lordship consulted the Court of Queen's Bench, who

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stated that the practice had prevailed as to persons in the custody of the Marshal, and that it was to be considered as confined to such cases.

This explanation of the practice and of its origin is, in my opinion, quite satisfactory; and it shews that an order for liberty to execute its own process on a party in custody of its own Officer, would probably not have been made by this Court, had its attention been called to the reason and origin of the practice. The cases, however, in which it was considered that such an order was necessary, contained a direct admission that detainer on criminal process confers no immunity from civil arrest, when such arrest or detainer was properly laid on. With regard to the case of *Wallace v. Murphy*, in the Queen's Bench, and the anonymous case in this Court, reported in 5 *Law Rec.*, they are very short notes. In the first, a conditional order was obtained, which was made absolute without argument. In the latter, in this Court, no statement of facts is given, nor any argument, nor does it appear what members of the Court were present; so that the grounds of the decision in either case can scarcely be collected: whether they proceeded on the generally received opinion to which I have been first adverting, of the necessity of previous leave, or any other ground. But whatever may have led to the orders made in these two cases is not sufficient, in our minds, to outweigh what is to be collected from the various other cases which are to be found, and to which we have been referred; and the express decision of the Court of Queen's Bench, made on full consideration, in the case of *Goodwyn v. Lordon*, reported in 3 *Nev. & Man.* and two other works. We were a good deal struck, in the course of the argument, by the circumstance of the defendant having been brought within the jurisdiction by means of a criminal charge.

If the plaintiff in this action had been connected in the remotest manner with the prosecutor in the criminal case, or if it had been shewn that he had been in any way instrumental in bringing the defendant within the jurisdiction for the purposes of the arrest, it would have essentially altered the aspect of the present application; but nothing of that kind has been so much as suggested.

We, therefore, think, that, under these circumstances, the defendant being in custody under a criminal charge with which the plaintiff here was quite unconnected, was liable to be detained by process of this Court, and that being in the custody of the sheriff, the Officer of this Court, no leave was necessary to be obtained previous to the execution of the writ, and, consequently, that the defendant is not entitled to be discharged from custody.

RICHARDS, Baron.

Concurring, as I do, in the judgment of the Court, I think it merely necessary to state that, in my opinion, the Court would have had full

jurisdiction to discharge the defendant, had it been shewn that there was any collusion between the party at whose suit he was arrested and the party who brought forward an unfounded criminal charge against him. I therefore carefully examined the affidavits, for the purpose of ascertaining whether any such collusion could be inferred in this case; for, I think it would be a gross perversion of justice to allow civil process to be executed against a person collusively and surreptitiously brought within the jurisdiction of the sheriff, under color of a criminal charge. There is nothing, however, of that kind in this case, so far as the plaintiff in this action or the sheriff is concerned. The naked question, consequently, now comes before this Court for its adjudication—whether a party in the custody of the sheriff upon a criminal charge, which turns out to be unfounded, may not be made amenable to a civil process issued out of this Court, and directed to and previously lodged with the same Officer—namely, the sheriff? I see no reason, either upon principle or authority, to hold that he may not be made amenable under such circumstances.

There is a wide difference between the case of a party coming in and surrendering himself to the sheriff, in compliance with the condition of his recognizance, and the case of a party arrested *in invitum*. A party who is so arrested does nothing as from himself to aid the ends of justice. The case of a man who enters into a recognizance to stand his trial before a Criminal Court is an excepted one; and it has been held to be so by this Court, upon the ground that it is in aid and furtherance of the ends of justice so to hold—and in that I agree; but the reason upon which the Court acts in that case does not, in my opinion, apply to the case of a person who is taken involuntarily into custody by an Officer of justice on a criminal charge.

In the case of *Pearson v. Yewens*, it is manifest that the decision of the Court went upon the ground of collusion or contrivance. In that case, after the illegality of the original caption had been discovered, it was attempted to give a false color to what had been so done, by means of the under-sheriff inserting the name of Slowman, the person who had made the illegal arrest, in a warrant at the suit of persons of the name of Robinson, which had been before issued and delivered to another Officer, one Nathan, but which that latter Officer had never executed; and it was sought, by such a proceeding, to justify the detention of the defendant by the sheriffs at the suit of the Messrs. Robinson and of other detaining creditors. Chief Justice Tindal, in giving judgment in that case, after adverting to the argument of counsel, who insisted that the sheriff was no party to the original arrest, which was admittedly illegal and unwarranted, and that *quoad* that arrest, the person who made it (Slowman) should be considered as a stranger to the sheriff, and that, therefore, there was nothing to prevent the sheriff from executing the

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writ at the suit of the Messrs. Robinson, and from holding the defendant in custody thereunder, or under detainers laid on at the suit of the creditors, proceeds thus:—" But it appears to us, that if Slowman is to be considered as a mere stranger in making the original caption, the defendant cannot be considered as having been in the custody of the sheriff, by being taken to Slowman's lock-up house, for the lock-up house of Slowman is not the prison of the sheriff; and the earliest period at which any writs in the sheriff's office could, in that case, attach, would be when the name of Slowman was inserted in the warrant. We cannot, however, consider the defendant as being lawfully in the custody of Slowman in consequence of the insertion of his name in the warrant originally issued to Nathan. It must, we think, be considered as a collusive act, intended to give a false color of legality to the original caption of the defendant by Slowman, and, as having, in effect, made the sheriff a party to the original illegality committed by Slowman, so far, at least, as to prevent the detainers from attaching." Now, it does not appear to me that there are any facts in this case similar in principle to those upon which the Court acted in *Pearson v. Yewens*.\*

\* The CHIEF BARON was absent from indisposition, and BARON FOSTER was presiding at *Nisi Prius*.

*Friday, November 28th.*

IN CHAMBER.

*Coram* PENNEFATHER, B.

PRACTICE—COMMON LAW SUBPŒNA—JOINT  
APPEARANCE—SEPARATE DECLARATION.  
52D GENERAL RULE.

LANAUZE v. G. STOKES, THOS. B. JACKSON, and CHARLES C. JACKSON.

THE three defendants were included in one common law subpoena, and having been served therewith, a *joint* appearance was entered for Thomas B. Jackson and Charles C. Jackson, upon which *separate* declarations were filed against each.

Mr. *Fitzgibbon* now moved that the declarations be set aside for irregularity, inasmuch as a joint appearance having been entered, the plaintiff was not warranted in filing declarations separately against each. If this could be done, the 52d of the General Rules of February, 1834,\* would be unavailing, and the debt indorsed on the writ in this case was one entire sum, and not separate demands against each defendant.

Mr. *James Plunket* relied upon the admitted practice of the Court, that in a common law subpoena *four* defendants may be included, and separate declarations filed against each—*Howard's Pleas side Exch.* 71—and in this case the defendants are separate indorsers on a bill of exchange.

Where three defendants were included in one common law subpoena, and a joint appearance was entered for two of them, upon which separate declarations were filed against each, *Held*, that such declarations were regular.

PENNEFATHER, B.

The practice is so established, and

Let the declarations stand.

\* The 52d General Rule directs, that "upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest or copy, and service and attendance to receive debt and costs, and upon the payment thereof within

"four days to the plaintiff, or his attorney, further proceedings will be stayed; but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

The form of the indorsement is given by the rule.

HILARY TERM, 1840.

## IN THE EXCHEQUER CHAMBER.

*Wednesday, February 5th.*

JOHN CLAUDIUS BERESFORD and CATHERINE MARY OTTIWELL  
*v.* WILLIAM FARRAN,\*  
 (*In Error from the Court of Queen's Bench.*)

JUDGMENT—REVIVOR—STATUTE OF LIMITATIONS,  
 3 & 4 W. 4, c. 27—PLEADING—DEPARTURE.

The period of limitation prescribed by the 3 & 4 W. 4, c. 27, s. 40, begins to run against a judgment from the date of the last revival, and not from the entry of the original judgment. FOSTER, B. *dis-sentiente*.

To a *scire facias* to revive a judgment brought by the executors of the con-see, against the heir and terre-tenants of the conusor, the defendant, a terre-tenant, having pleaded the 40th section of the above statute, the plaintiffs replied a judgment of revivor recovered by themselves against the conusor, within 20 years next before the issuing of the *scire facias* :—

*Held*, on demurrer, that the replication was good.

SCIRE FACIAS to revive a judgment. The writ, which was directed to the sheriffs of the county of the city of Dublin, was tested on the 31st of January, in the 7th year of the reign of King William the 4th (1837), and recited that Henry Ottiwell, in Hilary Term, in the 50th year of the reign of King George the 3d (1810), recovered against John Dunbar as well a certain debt of £200 sterling, by the acknowledgment of the said John Dunbar, as £2. 9s. 6d. damages, sustained as well by reason of the detention of the debt, as for expenses and costs. It further recited, that Ottiwell and Dunbar afterwards died, Ottiwell having made his will, and appointed John Claudius Beresford and Catherine M. Ottiwell (the plaintiffs), and one Richard Moore, his executors; that Moore died, and that J. C. Beresford obtained probate of the will, saving the right of the said Catherine M. Ottiwell; that Dunbar died seized of lands and tenements in fee-simple, and of several descendible freeholds. The sheriffs were therefore commanded by the writ to make known to the heir of the said John Dunbar, and also to the tenants of the lands and tenements of the said John Dunbar, whereof he or any person or persons to the use of him and his heirs, was or were seized in his or their demesne as of fee, or of a descendible freehold, in the term of the rendition of the judgment, to come and shew cause why the plaintiffs should not have execution against them for the debt and damages aforesaid of the lands and tenements which were of the said John Dunbar at the time of entering the judgment, or at any time since, according to the force, form, and effect of the recovery aforesaid.

\*The report of this case has been furnished by Mr. ROSS S. MOORE.

The sheriffs returned, that they had warned the co-heiresses of the conusor, and Farran, the defendant, who was one of the tenants of the lands which were of the said conusor at the time of the rendition of the judgment.

To the above writ the defendant Farran pleaded the following pleas, founded on the 40th section of the 3 & 4 W. 4, c. 27.\*

First plea.—That the plaintiffs ought not to have execution against him for the debt and damages aforesaid of the lands and tenements in the return of the writ of *scire facias* mentioned, whereof he was returned tenant, “Because he says that no part of the principal money of the said debt and damages in the said *scire facias* mentioned, nor any interest thereon, was paid, nor any acknowledgment of the right thereto, given in writing signed by the said John Dunbar, or by him or his agent, or by any other person or persons by whom the said judgment in the said *scire facias* mentioned was payable, or by the agent of any such person to the said Henry Ottiwell, or to the said John Claudius Beresford, or Catherine Mary Ottiwell, or to any other person entitled thereto, or to the agent of the said Henry Ottiwell, John Claudius Beresford, or Catherine Mary Ottiwell, or to any other person entitled thereto within twenty years next before the time of the issuing of the said writ of *scire facias* aforementioned, to wit, at Dublin aforesaid, in the county of the city aforesaid. And this he is ready to verify, “wherefore,” &c.

Second plea.—*Executio non* of the debt and damages, &c., “Because he saith that a present right to receive the same debt and damages accrued to a person capable of giving a discharge for and a release of the same, more than twenty years before the suing forth of said writ of *scire facias*, to wit, on the 1st day of November, in the year of our Lord 1816, at the place aforesaid, and that no part of the principal money of the said debt and damages in the said writ mentioned, nor any interest thereon, was paid, nor any acknowledgment of the right thereto, given in writing signed by the said John Dunbar, or by his agent, or by any other person or persons by whom the said debt and damages were payable, or by the agent of any such person or persons, to the said Henry Ottiwell, or to the said John

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\* Which enacts, that after the 31st of December, 1833, “No action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same; unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.”

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"Claudius Beresford, or Catherine Mary Ottiwell, or to any or either of them, or to their agent, or to the agent of any or either of them, or to any person entitled thereto, or to the agent of any such person, within twenty years next before the time of the issuing of said writ of *scire facias*. And this he is ready to verify; wherefore," &c.

To these pleas the plaintiffs replied, that "They ought not to be precluded or delayed from having execution against the said William Farran for the debt and damages aforesaid, of the lands and tenements in the return of the writ of *scire facias* aforesaid, mentioned, whereof he is returned tenant, because they say, that after the rendition of the said judgment in the said writ of *scire facias* mentioned, and within twenty years next before the time of the issuing of the said writ of *scire facias* to wit, in Michaelmas Term, in the 58th year of the reign of our late Sovereign Lord King George the Third, to wit, at Dublin aforesaid, in the county of the city of Dublin aforesaid, a certain other writ of *scire facias* to revive the said judgment was duly issued out of and under the seal of the said Court of our said Lord the King, before the King himself; and the said John Claudius Beresford and Catherine Mary Ottiwell farther say, that such proceedings were had and taken upon the said last-mentioned writ of *scire facias*, that it was afterwards, by the said Court of our said Lord the King, before the King himself, considered that the said John and Catherine should have their execution against the said John Dunbar, in the said writs of *scire facias* respectively mentioned, for the debt, damages, expenses, and costs aforesaid, according to the force, form, and effect of the recovery aforesaid, and soforth, to wit, as of Michaelmas Term aforesaid, in the 58th year of the reign of our said late Lord King George the Third, at Dublin aforesaid, in the county of the city aforesaid, as by the said last-mentioned writ of *scire facias*, and the said judgment thereon, of record in the said Court of our said Lord the King, before the King himself, may fully appear. And this they the said John and Catherine are ready to verify; wherefore they pray judgment and execution against the said William Farran for the debt and damages aforesaid of the lands and tenements in the return of the said writ of *scire facias* above mentioned, to be adjudged to them, and soforth."

To this replication the defendant demurred generally, and the plaintiffs having joined in demurrer, the case was argued in the Court of Queen's Bench in Michaelmas Term 1837, and judgment given by that Court for the plaintiffs.

Upon this judgment the present writ of error was brought. Common errors assigned, and joinder in error.

The case was argued in the Court of Exchequer Chamber, in Michaelmas Term, 1839, by Mr. *Gilmore*, Q. C., and Mr. *Sproule*, for the plaintiff in error, and by Mr. *John Brooke*, Q. C., and Mr. *Fitzgibbon* for

the defendants in error: and having stood over for the consideration of the Court, was this day called on for judgment.

The arguments on both sides having been substantially similar to those relied upon in the Court below, which have been already reported (a), it becomes unnecessary to state them here, especially as the case will be found so fully discussed by the members of the Court in the following judgments.

A difference of opinion having taken place on the Bench, their Lordships delivered judgment *seriatim*.

BALL, J.

This case comes before the Court by writ of error, from a judgment in *scire facias* of the Court of Queen's Bench. The original judgment was obtained by Henry Ottiwell, the testator of the defendants in error, in Hilary Term, 1810, against John Dunbar, since deceased. In the year 1836, after the death of both the conusor and conusee, a *scire facias* to revive the judgment of 1810, was issued at the suit of the defendants in error, who are the executors of the conusee, against the heir and terre-tenants of the conusor, to which the plaintiff in error, one of the terre-tenants, has pleaded, among others, two pleas of the statute of limitations:—The first, relying on the fact that no part of the principal or interest secured by the judgment was paid, and that no acknowledgment in writing, signed by any party liable, was given to any person entitled thereto within twenty years next before the issuing of the *scire facias*. The second plea relied on the fact, that a present right to receive the debt and damages mentioned in the *scire facias* had accrued to a person capable of giving a discharge for the same, more than twenty years before the issuing of the *scire facias*; and that no payment had been made, or acknowledgment in writing been given (as above), within twenty years next before the issuing of the *scire facias*. To these two pleas, the defendants in error replied, that within twenty years next before the issuing of the *scire facias* of 1836, to wit, in Michaelmas Term, 1817, a *scire facias* was issued to revive the judgment of 1810, and judgment of revivor was had thereon against John Dunbar. To this replication the plaintiff in error demurred generally. The demurrer was argued in the Court of Queen's Bench in Michaelmas Term, 1837, and overruled; and upon that judgment a writ of error has been brought.

The question raised on the pleading turns on the construction of the 40th section of the statute 3 & 4 W. 4, c. 27, and is substantially this: Whether the twenty years mentioned in that statute are to be considered as commencing to run from the time of the judgment of revival or of the original judgment? Before considering the terms of the enact-

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(a) 6 Law Rec. 2d ser. 10.

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ment, it is very important to consider the effect of the construction of it contended for on the part of the plaintiff in error, namely, that the twenty years run from the time of the entry of the original judgment. See the consequences that would follow from holding that doctrine. In every case where twenty years have elapsed, from the time of the entry of the original judgment, and no express admissions have been made in writing of the debt, and no payments have been made on foot of it, it will follow, that although the judgment, according to the admitted law before the passing of this act, was regularly kept alive by successive revivals, and was dealt with accordingly by third persons as a "common assurance of the realm," and assigned as such under the Irish statutes, for valuable consideration, or, perhaps, put into settlement as a provision for families (a circumstance of no unusual occurrence in Ireland), yet, immediately upon this statute coming into operation, it is, by a retrospective effect, to render the amount of the judgment irrecoverable, and thus to annihilate the security which, up to that moment, had been unimpeachable. Again, this effect may have been produced without it having been possible for the owner of the judgment to have provided against it. Take, for instance, the case of a conusor who dies shortly after the judgment is entered, and leaves no personal property, but dies seized of a freehold estate, on which the judgment attaches; and suppose prior incumbrancers to be in possession of such estate, and so to continue for more than twenty years—according to the doctrine of the plaintiff in error, although, in such a case, there may have been no person in existence either to make a payment or to give an acknowledgment, the creditor loses his debt, although he had availed himself of the only means allowed him by the law for keeping it on foot, namely, by issuing writs of *scire facias* from time to time, and obtaining judgment of revival thereon. In my mind, the Court should struggle against such a construction of the statute, as it must occasion results so extensively ruinous to judgment creditors in Ireland. If such be the clear unequivocal construction of the act, the Court has no alternative but to adopt it; but if the terms of the statute be obscure or ambiguous, and not necessarily involving such a doctrine, the Court will not lose sight of the principle, that a party is not to be stripped of his undoubted property or rights by the ambiguous terms of an act of parliament. Then let me consider what are the terms of this statute, which, according to the plaintiff in error, coerce the Court to give it the construction for which he contends, and what are the circumstances under which that construction is insisted on?

It is admitted, that in 1833, when the act of 3 & 4 W. 4 came into operation, the money secured by this judgment of 1810 was clearly recoverable; but it is said now to be barred by the statute, inasmuch as more than twenty years elapsed from the entry of the judgment in 1810,

and "a present right to receive the sum secured by the judgment had accrued to a person capable of giving a discharge for the same," and no payment was made or acknowledgment in writing given within the period of twenty years above mentioned. It thus appears that the question turns upon the meaning of the term "present right to receive the sum secured by the judgment," the plaintiff in error contending that there could have been but *one* "present right," and that *that* right accrued when the original judgment became a lien on the land in 1810, and the defendants in error insisting, that although "a present right" may have accrued in 1810, yet "a present right to receive the sum secured by the judgment accrued" also upon the obtaining of the judgment of revivor in 1817 (that is, within twenty years before the issuing of the present *scire facias*); and that, consequently, the defendants' right to recover is not barred by the statute. To sustain the plaintiff's position, it is argued that the terms "secured by the judgment" mean the original judgment of 1810, and cannot embrace the judgment of revivor of 1817, *that* being only on award of execution, and not a judgment in the legal acceptation of the term. The contrary, however, of this position appears to me sufficiently established by the case of *Ram v. O'Brien* (a), referred to, in the argument, without adverting to other authorities, that case deciding that a revival against husband and wife of a judgment obtained against the wife before marriage, is an original judgment, and not a mere award of execution.

It is insisted, however, on the part of the plaintiff, that that case only establishes that, for *certain purposes*, a judgment of revivor may be deemed an original judgment; that is, that it may be so considered with reference to the husband (he not having been a party to the first judgment), but not with reference to the wife, against whom the first judgment was obtained. But what is the foundation of this distinction? Did not the *scire facias* go against both? and did it not put in issue against both the obtaining and subsistence of the first judgment? and was it not open to both to traverse this matter by plea? and was not the judgment in *scire facias* an adjudication against both, of the right of the plaintiff under the first judgment (the matter put in issue by the *scire facias*), and an award of execution accordingly? and, finally, could not an action of debt upon the judgment in *scire facias* have been brought against both?—in other words, is there wanting in the judgment in *scire facias* any characteristic of an original judgment as against both? Then, if the judgment of revival of 1817 in the present case may be deemed an original judgment, why should it not be treated in the terms of the statute, as "the judgment by which the debt is secured?" And, if so, twenty years have not elapsed since "a present

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(a) 3 Mod. 170; S. C. Comb. 103; S. C. Carth. 30; S. C. Holt. 97.

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"right to receive the sum secured by the judgment accrued." The plaintiff in error answers, that there can have accrued but one present right to receive the sum secured by the judgment; and that as "a present right" to receive the same accrued beyond question in 1810, there could be no subsequent accruer upon the judgment of 1817. But does not this argument involve the assumption, that the judgment of 1817 is not an original judgment capable of securing the debt?—And if the contrary be the law, as I consider it is, why should not the obtaining of the judgment of 1817 be considered as the acquisition of "a present right" to issue execution, that is, to receive the sum secured, as well by the judgment of 1810 as by the judgment of revival of 1817? Then, if the argument of the defendants in error were less cogent than it is, are the terms of the statute, "a present right to receive the sum "secured by the judgment," so clear and unambiguous, as to coerce the Court to construe them so as to occasion (by a retrospective operation) loss and ruin to individuals and families, to such an extent as must be the consequence of such a decision? In my judgment, they are not.

It has been argued for the plaintiff in error, that the effect of admitting the defendants' construction of the statute will be, to introduce by implication a third exception into the 40th section, in addition to the two therein expressed; and *Maddox v. Bond* (a) has been cited as an authority to shew that this cannot be done. The plaintiff's argument is put thus:—The 40th section provides, that after twenty years, the judgment shall be barred, unless a payment be made, or an acknowledgment in writing be given within that period; but if the defendants' construction be well founded, the 40th section should be read thus:—unless a payment be made, or an acknowledgment in writing be given, or a judgment of revivor be obtained within the twenty years. Now, in the first place, taking the judgment of revivor of 1817 to be "a judgment" securing the debt, no question as to a third exception can occur, inasmuch as twenty years have not elapsed since that judgment was obtained. But, were it necessary to imply a third exception in addition to the two expressed, in order to sustain the construction for which the defendants contend, would it follow that, because in *Maddox v. Bond*, and other cases that may be cited, the doctrine of "*expressum facit cessare tacitum*" was acted on in the construction of statutes, it is to be a universal rule, that where any exceptions to an enactment are expressed, none others can be implied, although, without such an implication, the legislature must be held to have intended, by its enactment, consequences the most mischievous and unjust? The rule of construction to be found in *Plowden* is far different. In *Reniger v. Fogossa* (b), the rule is put thus:—"Where laws or statutes are made, yet there are some things

(a) Ir. T. R. 332.

(b) Plowd. 9.

"which are exempted or foreprised out of the provisions thereof by the law of reason, though not expressly mentioned."

The view which I have taken of the construction of this statute appears to me to receive some confirmation from a circumstance to which I have in part adverted—I mean the absence of any provisions in the act for the case of prior incumbrancers continuing in possession of lands bound by a judgment for more than twenty years after it has been obtained; so that, in the case I before put, the judgment creditor must necessarily lose his debt altogether, if the plaintiff's construction of the act be well founded. Now, it will be observed that the 42d section provides for the case of prior creditors being in possession, so as to prevent the *puisne* creditor recovering the interest of his debt, and it empowers him to recover all the interest which may be due to him for the period during which such prior creditor may have been in possession, although that period may have exceeded six years. Is it not reasonable to infer from this provision, securing the creditor against the loss of interest by reason of a prior creditor being in possession, that the statute would have provided against the loss of the principal as well as the interest to be occasioned by the same circumstance, if, upon the construction which the legislature intended should be put upon the act, such an event could occur?—In other words, if the legislature intended that the judgment creditor should not have the power of keeping his judgment alive by revivals, must he not, of necessity, in such a case as I have put, be deprived of his demand, without its being in his power by any means to prevent the loss; and if that were so, would not the same act which protected the creditor from losing the interest of his demand during the period when, by reason of prior incumbrancers being in possession, it was not in his power to have recovered it, have secured the judgment creditor against the loss of his principal and interest under similar circumstances?

As to the question of pleading raised in argument, with reference to the alleged departure in the replication from the cause of action stated in the *scire facias* itself, it was not much pressed, and I am not sure that I am called on to notice it; but I may say, that the replication relying on the judgment of revival appears to me an affirmance of the writ, and not a departure from it: and, upon the whole of the case, I am of opinion that the decision of the Court of Queen's Bench should be affirmed.

PERRIN, J.

The difficulty in this case arises from the peculiar phraseology of the statute, viz., "That no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, upon or payable out of land, at law or in equity, but within twenty years after a present right to receive the same shall have accrued

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"to some person capable of giving a discharge for or release of the "same, unless," &c.;—language new, and, to my apprehension, not very distinct or clear,—capable, as it has been argued, of two interpretations. The one construing the terms "within twenty years next after a present "right to receive the same," to mean twenty years after the *first* present right to receive the same accrued to any person;—the other construing them to mean within twenty years next after a present right established or accrued under any of the securities mentioned in the clause. I have felt much embarrassment, and entertained considerable doubt in the course of the argument, but have finally come to the conclusion that the plaintiff here is not barred, nor his right extinguished by this statute.

When the language of a statute is not clear, a construction destructive of right ought not to be adopted; on the contrary, where the question for consideration is, whether existing right and property are to be taken away and extinguished by a new statute of dubious import, it ought to be strictly construed and a plain provision shewn to that effect. We are not to assume an intention in the legislature to an unexpressed purpose, and thereupon, interpret doubtful language and novel phrases to carry that assumed intention into effect, in order to extinguish property and right; we are not at liberty to do so. At the passing of this act of parliament the plaintiffs below had the judgment of Michaelmas 1817 in full force, binding the land of the defendant below, and a charge thereon until 1837—upon which, by the law of the land, the plaintiffs below might have levied the sum of money thereby secured at any time before Michaelmas 1837. They had upon record a judgment, by which it is recorded that the Court in Michaelmas Term, 1817, considered that they should have execution for the debt and damages awarded by a former judgment, then shewn to be in force and unsatisfied. It is said, that this statute annulled and extinguished that judgment and debt on the 31st December, 1833. For this part of the argument the case may be considered as if the judgment of revivor or in *scire facias* had been obtained in Michaelmas Term, 1832, or Easter Term, 1833. In that case, there would have been on record a judgment, say in Michaelmas Term, 1832, or Easter Term, 1833, obtained in an action of *scire facias*, to which the defendant might have (and may unsuccessfully have) pleaded—in which he might have shewn, if any reason there was, why the plaintiffs ought not to recover their debt and damages, ascertained and awarded by the former judgment;—one manifestly and unquestionably, for some purposes, at least, a new judgment, and, whether an original judgment or not, which has the direct effect of reviving the former judgment and giving execution thereon, behind which, according to the opinion of Lord Holt in *Trevivan v. Lawrence*(a), the

(a) 2 Ld. Rayd. 1050.

defendant cannot go. Then, has this statute annulled and rendered that judgment of 1817, or of 1832 or 1833, as the case may be, of no effect, for to that extent the argument must go or it does nothing. If such be the enactment, such, of course, must be the judgment pronounced by us;—but before we do pronounce such to be the law, working such manifest injustice, it is incumbent on us to be sure and certain that such is the enactment, and that the law is so. Now, what is the enactment?—[His Lordship here read the 40th section.]—It does seem to me that the judgment in *scire facias* does confer “a present right” to receive that which it awards an execution to levy. In this case, by the judgment of revivor in 1817, it is adjudged that the plaintiffs below should be at liberty to issue execution for the debt and damages aforesaid, and levy the amount; whence it seems to follow that a present right to receive this sum of money, was thereby awarded, and did then thereby accrue to them being capable of giving a discharge for the same, within twenty years before the bringing of the present suit. But it is urged in reply, and as an answer to this view, that there was, and had been, a present right to receive that sum, viz., the money secured by the original judgment of 1810, and by the revival of 1817, twenty years before the bringing of this suit, viz., in 1810; and that within the meaning of the legislature, the term “present right” as used in the statute, when applicable to the case of a revived judgment, imports the present right which accrued under the original judgment of 1810, then to receive the sum of money which was secured by that judgment, and afterwards by the judgment of revival in 1817, and cannot mean the right to levy, which accrued in 1817, under the two judgments, viz., the original judgment and the judgment of revivor;—and further, that the “sum of money” (that being the word used in the act), or debt, is distinct from the “security.” How far may that argument be pushed—or where can it be stopped? There was certainly a right to receive the money before 1817—a debt due and a hand to receive—a person capable to give a discharge or release in 1810: but may not a fresh right to receive it have afterwards accrued in 1817? And was there not also a previous right to receive the same before 1810? Was there not a debt before 1810? Was there not a sum of money due before the judgment of 1810, for the recovery of which that judgment was entered? And was there not also a person capable of giving a discharge for the same previously to that period? If so, it is obvious that this argument, founded on the distinction between the sum of money and the security, goes to an extent much beyond what could have been in the contemplation of the legislature. The question is not, whether by ingenious and subtle arguments such a meaning may be elicited from, or pressed upon the terms of the statute, but whether such was the real meaning in the contemplation of the legis-

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lature. Suppose the case of a bond, with warrant of attorney to enter judgment thereon, given fourteen or fifteen years before judgment was, in point of fact, entered.—During all that period there is a person capable of giving a discharge of, or release for the same; and yet, it could not be argued that “a present right” accrued upon the execution of the bond. No, the legislature meant, and the statute imports “a present right” under the securities by which it is charged and leviable on the land, viz., the judgment of 1810, and the no less valid and solemn judgment of 1817, which is conclusive upon the defendant, which he cannot gainsay, and behind which the plaintiff need not go. 2 *Lord Raym.* 1150.

The statute says that “no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien upon or payable out of land”—(How was this sum of money secured at the time of the passing of this act? Surely as well by the judgment of 1817, as by that of 1810).—“but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same.” “A right”—under what? Surely under the securities by which it is charged. “To receive the same”—that is, the sum charged thereby—by the security or securities. “Shall have accrued.”—How? Surely *under* the security or securities just before mentioned, and *since* the security or securities by which it is secured and made an available charge on the land, and a present right to receive this money and give a release or discharge for the same under the judgments by which it was secured at the passing of the act, did not, and could not accrue until *they* existed. That is a reasonable construction and meaning for the statute, and the words “present right” must not necessarily mean a pre-existing right, accrued before the last security by which it was then charged and leviable on the land, but may comprise a right which accrued under and since that security. It is neither incorrect nor novel in the law, to say, that a right or an action has accrued within a limited period, which, though antecedently existing, derives its present efficacy and validity from a fresh promise or acknowledgment within that period, as in many instances under the general statute of limitations is familiar.

As I have already observed, the phraseology of this statute, “present right,” &c., is new, and not very precise or clear; our duty is to construe it with due regard to the preservation of existing right, to prevent injustice, and certainly not to strain it in order to produce the contrary effect. Many cases may be put illustrative of the ill consequences, difficulties, and inconveniences, that may ensue upon the construction contended for by the plaintiff in error. Suppose a judgment fifteen years or more old, and a *scire facias* against the cosutor, the creditor then finding, for the first time, available property,—a plea of payment,—issue thereon,—and

verdict establishing the debt to be still due and unpaid, and after protracted litigation, judgment and award of execution in the *scire facias*, in the eighteenth and nineteenth years of the original judgment.—Suppose then the debtor dies, and the plaintiff is obliged to sue out a *scire facias* against the heir and terre-tenants twenty years from the original judgment—is it to be held that his right and action are barred—a dormant claim—although there has been a verdict and judgment within three or four years, or less, establishing the debt to be due and unpaid?

Then take the case put by my Brother BALL, of property covered by prior incumbrances, so that the creditor cannot take effectual proceedings for the recovery of his demand; under such circumstances he cannot have execution, neither can he procure a part payment of principal or interest, nor an acknowledgment in writing. How is he then to protect himself? What other remedy has he than a *scire facias* to revive his judgment, and keep it alive? Suppose a *scire facias* sued out, and that the party served either appears and pleads,—or does not appear, and lets judgment go by default,—or does appear, and lets the plaintiff have judgment by *nil dicit* (and upon the face of these pleadings it does not appear that any of these may not have been the case); the creditor has then his debt established on record to be still due, and a power to levy the amount by execution awarded, say in the fifteenth or nineteenth year from the original judgment, upon which he may then, if he can find available property, act for one or five years, as an undoubted unpaid debt. When the twenty years elapse, is the whole annulled, and the judgment in *scire facias* extinguished, and thenceforward rendered of no avail, because a right to receive the money secured by the original judgment existed for twenty years, although a present right to issue execution for, levy and receive the same, was awarded by the judgment in *scire facias* one or five years ago? It seems difficult to reconcile a construction attended with such inconveniences—to reason and a due regard to consistency.

The legislature was aware of the existing state of the law at the time of passing this act, and consequently, apprised of the provisions of the 9 Geo. 4, c. 35, passed so short a time previously, for the re-docketing and continuance of these judgments, which, speaking of the judgment in *scire facias*, uses the term “revival,” calls it “a revival of the judgment,” enacts in section 4, “That when any judgment shall be duly revived in any of the said Courts, according to the course and practice of the said Courts, respectively, an entry of such revival shall, for the purposes of this act, be made in a book to be kept for the purpose by the proper Officer of each of the said Courts, respectively, and which he is hereby directed and required to keep in the manner and form set forth in the schedule to this act annexed; and which entry shall in all cases be, and be held to be evidence of the due

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"revival of such judgment, without producing the judgment or revivor thereof." It is difficult to suppose that the legislature, with these provisions in their contemplation, yet intending that no judgment should be so kept alive and affect the estate of a fugitive or adverse party, would have used the language of this 40th section to effect that purpose, and would not have in more plain and direct terms expressed that intention and carried it into effect.

Upon the whole, I think that the construction of this 40th section of the statute which has been adopted by the three Courts of Common Law, and by the Master of the Rolls in Ireland, is not repugnant to the words of the act, but well consists therewith, and puts the true meaning upon this section. It introduces no new exception, while, at the same time, it does not destroy but preserves existing rights, which, if it be deemed right and advisable by the legislature to annul, may and ought to be annulled and destroyed by plain and explicit enactment, and not by speculative construction of ambiguous terms and novel phrases.

With respect to the question of a departure in the pleading, that seems to have been abandoned at the bar, so that I will merely say, I think it plain there is no departure. The judgment in *scire facias* revives, affirms, and sustains the original judgment. As was observed in the argument, it is no more a departure, than where upon issue joined on the very words in the general statute of limitations (upon plea that the cause of action did not accrue within six years, and replication that it did arise within that period), is there a failure in evidence, but the plaintiff sustains *that* replication, by proving the payment of interest or of part of the principal, or a fresh promise or acknowledgment within that period. For these reasons, I am of opinion that the judgment of the Court below ought to be affirmed.

CRAMPTON, J.

The question in this case having been so fully and frequently discussed, I think it sufficient to say, that I adhere to the opinion I entertained in the Court of Queen's Bench, which is, that the plaintiffs below are entitled to judgment.

FOSTER, B.

This is a proceeding by *scire facias*, brought by the executors of Henry Ottiwell against William Farran, as terre-tenant of John Dunbar, calling on him to come and shew cause why the plaintiff should not have execution of the lands, which were John Dunbar's at the time of the rendition of a judgment obtained against said John Dunbar, in Hilary Term, 1810.

The *scire facias* is tested on the 31st January, in the 7th year of the

reign of *W. 4*, that is, in the year 1837. It was therefore not sued out until more than 27 years after the rendition of the judgment of which it seeks to obtain execution; and the question raised is shortly this: *whether, upon a judgment obtained in 1810, duly revived in 1818, the plaintiffs can recover in 1837*—no interest or principal having been paid on it, nor any acknowledgment of the right thereto having been given in writing during the period of 27 years, which intervened between the time when the judgment was originally obtained in 1810, and the issuing of the present writ of *scire facias* in 1837? It seems to me very clear, that in such a state of facts, previous to the late statute of limitations, namely, the 3 & 4 *W. 4*, c. 27, the judgment creditor would have been entitled to recover; in short, that the law *was* such in effect as is now contended for by the plaintiff's counsel. But it appears to me that the statute in question *introduced*, and *intended to introduce* a change of the law in this respect, and that by the law as it now stands, it is no longer competent for a judgment creditor to recover under such circumstances. It appears to me that one of the leading objects of the statute was, that land should not continue to be bound, either by mortgage or by judgment, or by any sort of lien or incumbrance, for a longer period of time than twenty years, unless there should be either a payment of some principal or interest on account of the sum of money secured by such lien, or else some acknowledgment given in writing of the right of the creditor claiming by virtue of such lien, within twenty years next before the attempt to assert such his claim:—in short, that the lapse of twenty years should constitute a bar to the claim, unless there had been either some payment on account of the money due, or some written acknowledgment of the subsistence of the lien, and that it was the object of the act to *exclude every other mode of preserving* the lien in existence for more than twenty years, except only these two, namely, either actual payment on account, or actual acknowledgment in writing: The judgment creditor here, in effect, contends for a *third* mode, namely, the process of reviving the judgment. This, he says, shall operate to preserve the lien. The true statement of the question, therefore, between the parties in the present case is, whether a judgment of revivor shall preserve the lien, though no payment be made or acknowledgment in writing given?

But before entering into a consideration of that question, it is necessary that we should distinctly understand the full extent of what is contended for by the judgment creditor upon his construction of the statute. His counsel at the bar fairly admitted that they do go, and must go the whole length of insisting, that *so often as a judgment shall be put through the form of being revived, the twenty years are to begin to be reckoned anew* from the period of the last revival, *without any reference to the date of the obtaining the original judgment, and without any reference to the time at which the sum of money first became secured*

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as a lien on the lands in question, and without any reference to the fact of whether any payment on account of either principal or interest ever has been made, either within twenty years or at any time antecedent to the revival, and without any reference to the fact of whether any written acknowledgment of the right ever has been given; so that, according to this account, if we suppose the form of reviving the judgment to be gone through by the creditor at the end of nineteen years after the time of originally obtaining it, and if we suppose a similar proceeding to be adopted at the end of five other successive periods of nineteen years each, we should, at the end of upwards of a century, have the land still bound, notwithstanding that, within the whole of that time, no payment on account of either principal or interest ever had been made, or any written acknowledgment of the right ever had been given.

This construction of the statute, contended for by the judgment creditor, is embodied in a phrase long familiar to conveyancers in Ireland, but which I do not recollect to have seen in the text-writers of our sister country, namely, that we must not "*look behind a judgment of revivor*;" so that although behind it there may be a century of non-payment and of non-acknowledgment in writing, the judgment of revivor is to be held as *drawing a curtain, as it were*, between us and those circumstances, and that we are no longer at liberty to advert to them.

I confess I find it impossible to come to the conclusion that the legislature had any such view when it enacted the statute of limitations in question, namely, the 3 & 4 W. 4, c. 27. On the contrary, I believe it was the true object of the statute of the 3 & 4 W. 4, to put an end to the possibility of land continuing to be bound for such long and almost indefinite periods of time, and to *supply altogether new tests for determining* under what circumstances land should become released from such liens, and to declare that such circumstances should henceforward be the facts of non-payment or non-acknowledgment for twenty years consecutively, and to enact, in effect, that no other circumstances should operate to preserve the lien.

It is certainly possible that the legislature may, in any particular case, frustrate its own intentions by the inartificial or incautious manner in which its enactments may be worded; and a Court must construe their meaning, not by conjectures as to what they intended, but by considering what the legislature actually has said. *Quod voluit non dixit* sometimes is the case; but it does not appear to me that such has been the case in the present instance. On the contrary, it appears to me that the words employed by the legislature do, upon the soundest principles of construction, give effect to that which appears to me to have been their intention.

Fully admitting, then, that a Court is not at liberty finally to decide what has been the intention of the legislature in any other manner than by considering the legal effect of the language which it has employed, we are yet at liberty, in any case, for the purpose of illustration, to advert to the history of a statute. Courts have, in pronouncing their judgments, so referred to the history of the statute of *Quia emptores*, to the statute of uses, and to the statute of frauds; and in like manner, and not otherwise, it may not be amiss to refer to the well-known origin of the statute now in question. We are, perhaps, more at liberty to do so in the present instance, from its having been so urged in argument, that the authors of this act could not have intended to impair the securities of creditors, and to introduce those inconveniences and mischiefs which, it was assumed in those arguments, would follow from the construction contended for by the judgment debtor in the present case.

If it were only as applying to that argument, it seems not undesirable that we should advert to the history of the act, which will quickly lead us to the conclusion, that different persons have taken very different views of inconvenience; and that while counsel at the bar have considered only the interest of judgment creditors, the authors of this act were thinking rather of the reasonable interests of the proprietors of landed estates.

This bill, it is well known, was brought into parliament in order to give effect to that portion of the recommendations of the First Report of the Commissioners appointed by the Crown to inquire into the state of real property, which relates to the limitations of actions and suits respecting real property, and the simplifying the remedies for trying the rights thereto; and, I believe I may add further, as a matter of fact, that the penners of this act of parliament were no other than the Commissioners themselves. The Report of the Commissioners, on which this act was founded, is most certainly not a document that can control its construction; but, under the circumstances, it will not misbecome us to look into the report, as a document well deserving respectful attention.

The Commissioners comprised within their number some of the most eminent conveyancers in England, and they sought out, and have published in their appendix, the opinions and advice of all such persons as were best qualified to assist them; and the result has been an exposition of the law of real property, perhaps as instructive and important as any other treatise in the law; and if the question could have been put to the Commissioners, whether *they* meant to recommend, that while a debt secured by mortgage should confessedly cease to be a lien in twenty years, unless a payment on account should be made, or an acknowledgment in writing should be given, that yet a debt secured by a judgment should continue by possibility to bind the land for successive centuries,

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in the absence of either payment or acknowledgment, it seems not very doubtful what would have been *their* answer.

That answer, I apprehend, would have been, "We mean that land shall be relieved from liens, so far as the principal sum is concerned, in twenty years; and we mean it to be relieved from interest in six years.—And there is the 40th section of the act to accomplish the *first* object, and there is the 42d section to accomplish the second object;—and we intend no favor to a judgment which we do not grant to a mortgage."

With regard to the question of whether they considered a judgment as a species of lien entitled to any peculiar favor, I shall just beg leave to read a passage from the 59th page of their report:—"The state of the law respecting the right of a creditor who has obtained a judgment for his demand over the *real* property of his living debtor, appears likewise very objectionable, whether regard be had to the complicated and dilatory relief afforded by *elegit*, where an attempt is made to enforce the judgment, or to the continuing *charge of dormant judgments, which make the land often in effect unsaleable, and add to the expense and risk of every transfer*. This is a subject seeming to us to require our attention, as well as that of the Commissioners appointed by your Majesty to inquire into the practice of the Courts of Common Law."

The act of parliament in question was passed in four years after the presentation of this report, and without any further explanation of the views of the Commissioners on the subject of judgments. But I will now suppose that the Commissioners never had made any report, and proceed to consider the act of parliament merely in itself:—and, upon this view of it, it will not be denied that it had for one of its objects to relieve lands from liens, and to have appropriated its 40th and 42d sections to that purpose: the 40th section embracing the subject so far as principal is concerned, and the 42d so far as regards interest. The exact words of the 40th section, upon which section the present question arises, are as follows:—

"And be it further enacted, that after the said 31st day of December, 1833, no action, or suit, or other proceeding, shall be brought to recover *any sum of money* secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at Law or in Equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of *the same*, unless in the mean time some part of the principal money, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent; to the person entitled

"thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments, or acknowledgments, "if more than one, was given."

In this enactment, we observe, first, a prohibition that any form of proceeding should be adopted to recover a sum of money secured upon lands, except within twenty years next after a present right to receive the same shall have accrued. A *present* right to receive *the same*—that is, the sum of money so secured. It will be found very material to remember this—that it is the sameness of the sum of money, and not the sameness of the security, which the act adopted as the test. Such is the general prohibition. To this, however, there are two exceptions, and only two, provided in the section.

The first exception is, where a payment has been made on account of *the sum of money* within the twenty years. The second exception is, where an acknowledgment in writing has been given within the twenty years. In either of these cases, the twenty years are to begin to run anew from the date of the payment on account, or from the date of the acknowledgment in writing, as the case may be; but the act acknowledges no other terminus from which the twenty years can be allowed to run anew, except only from either of these two, that is, from a payment made, or an acknowledgment in writing given.

The judgment creditor here contends, however, that, in effect, there is a third terminus contemplated by the act, or at least permitted by it, certainly not expressed by its words, namely, any *revival of the judgment*. If such was the intention of the legislature, it is a little extraordinary that they should not have said so. How material would it have been for them, when mentioning payment and acknowledgment in writing, as the two recognised exceptions to the bar, to have added the word "revival," as connected with a judgment. Their omission to employ any such word seems to be strong evidence of their intention to recognise no such exception. The form of expression used in the act, which, it is contended for by the judgment creditor, has the effect of rendering a revival of a judgment, in effect, a third exception to the bar of twenty years, is as follows:—"within twenty years next after a present right to receive the *same*, shall have accrued to some person capable of giving a discharge for or release of the same." The judgment creditor alleges that the revival of his judgment brings him within the exception herein described; for he says, that upon a revival, a present right to receive a sum of money does accrue to a person capable of giving a discharge for or a release of the same, namely, to the judgment creditor. But we must recollect, that in the very instant *before this alleged accruing, and also in the very instant of the*

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*alleged accruing*, the judgment creditor was already in full possession of a present right to receive the *same sum of money*, and capable of giving a discharge for or release of the *same*, by virtue of a *former accruing* of exactly the same right, which former accruing was contemporaneous with the moment when *the sum of money first became a lien on the land*, and from that moment the twenty years had been running. The judgment creditor, during all that preceding time, was therefore in uninterrupted possession of the "present right to receive the same," and during all that time he had been capable of giving a discharge for or a release of the same. He had this right and this capability, exactly as much before the revival as he had afterwards, and his right to receive the specific security which formed the lien on the land, was neither increased or diminished, or in any way affected by the revival of the judgment.

Now, in reference to the word *accrue*, I confess I do not understand how it can be said, that a right to receive *the same sum of money can be said to accrue anew, which right has been all along in continuance, and has been in pre-existence uninterrupted.*

It must not be forgotten in what manner the statute describes the right which is to accrue. It is the right to receive *the same sum of money secured by any mortgage, judgment, or lien.*

*Now, the money continues the same*, although the original and revived judgments by which it is secured may be considered as different; but it is the sameness of the money, and not the sameness of the security, which the act adopts as its test, and it is the accruing of the right to receive the sum of money which is selected by the act as constituting the date and the terminus from which the twenty years are to be reckoned.

I do not desire to establish any conclusion by verbal criticism; but if the word *accruing* is dwelt upon by the judgment creditor, it appears to me that the most technical tests of grammar to which he may be disposed to resort, are as much against him as the sense and reason of the section.

It appears to me clear upon reading the 40th section of the act, that in whatever way the legislature meant to deal with any one of the liens mentioned in the first sentence of that section, it meant in the same way to deal with the other liens therein also mentioned. The words employed are "any sum of money secured by any *mortgage, judgment or lien.*" The word "judgment" here immediately follows the word "mortgage," and the words employed to provide a bar to recovery on the judgment, and to specify the exceptions to that bar, are the very same that are employed to bar the mortgage; nothing, in fact, provides a bar to either, except the words employed in the concluding members of the same sentence, in which both the mortgage and the judgment are mentioned in juxta-position with each other. Let us now suppose,

that on the same day, in the year 1810, when Dunbar became indebted to Ottiwell in the sum of £200 on foot of the judgment in question, he became indebted to him also in a second sum of £200, secured to him by mortgage. Here we have two liens on Dunbar's landed estate, one by mortgage, and the other by judgment, both dating their existence from the same day, *and a present right having accrued to Ottiwell* on the same day, namely on a day in 1810, to receive the money secured on each. And let us suppose further, that on neither security has any payment been made, or any acknowledgment in writing ever been given for twenty-seven years. Can we suppose it was the intention of the legislature when they enacted the 40th section, to deal differently with these two liens upon Dunbar's estate?

But what becomes of the security by mortgage under the operation of the 40th section, in the case which I have put? The lien is at an end. The land is free. Are we then to attribute to the legislature a tacit intention that the effect of the very same words upon the £200 secured by judgment, should be directly the reverse? But the judgment creditor here says, that such was their intention. If they had intended such a preference for the judgment over the mortgage, assigning to the judgment a capacity for enduring for centuries, under circumstances which in twenty years would put an end to the mortgage, would they not have said so? And to what are we to attribute their silence, except to their intention that the judgment, in common with mortgages and all other liens upon landed property, should be dealt with in one and the same way, and be subject to the same rule, and that the same circumstances which should bar the one should bar the other.

But the judgment creditor in this case maintains the contrary, and insists, while he must admit that although in the case which has been put, the security by mortgage would be destroyed, that yet the security by the judgment would be preserved, and that it may continue to be recoverable for centuries to come, provided only that it is revived once within every twenty years, though no payment may ever hereafter be made on account of it, or any written acknowledgment ever be given of the right; and what is still more extraordinary, that the act has produced this result, destroying the mortgage by the very same expression which, it is said, has the effect of failing to affect the judgment.

If such really is the effect of the language employed in this section, in an act professing to be a statute of limitation; a statute of limitation, which in every other instance evinces anxiety to shorten those periods of limitation which it found established, and to introduce new periods of limitation where no limitation before existed,—I cannot but consider it as the most singular and anomalous occurrence that is any where to be met with in legislation.

I come now to the consideration of the rule that a judgment of re-

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vivor operates as a prohibition of any reference to the original judgment.

The circumstances which have led to the wish of a party to revive a judgment, whether in England or Ireland, have been either,—first, where a new person who was not a party to a judgment has derived a benefit by, or become chargeable to the execution of it;—this occurs in the cases of survivorship, marriage, bankruptcy, and death:—or,

Secondly, when it has been rendered necessary by lapse of time, as where it was desired to sue out execution after more than a year since the judgment had been obtained.

These two occasions for reviving judgments by *scire facias*, have been common both to England and Ireland, but have had a practical operation in Ireland much more frequently than in England, owing to the Irish statute, which has made judgments obtained upon confession to be assignable and transferrable securities—thereby rendering them common assurances in Ireland, and furnishing a reason for keeping them in existence here for a reason that does not exist in the sister country. But there has been a third occasion for wishing to revive a judgment, peculiar to Ireland, and which has had a very extensive application, and this has arisen out of the Irish statute, 8 *Geo.* 1, c. 4 sec. 2, to which there is no statute analogous in England.

This statute enacts that “If any person shall prosecute any action “or suit for recovery of any debt due by judgment, which shall have “been due and payable by the space of twenty years before such action “or suit brought, where no action or suit hath been prosecuted for “recovery thereof, nor any interest or money hath been paid, or other “satisfaction made on account thereof, within the space of twenty “years before the commencement of such action or suit, the defendant “shall and may be at liberty to plead payment in bar of such action.”

Thus this Irish statute so early as the year 1721, had provided that twenty years’ non-payment should be a bar to a judgment creditor, in like manner as the late English statute has done in the year 1833; but the Irish statute provided also a peculiar mode of preventing the twenty years from running, which the English statute has studiously omitted, namely, the prosecution of a suit, which, under the words of the Irish statute, supplied a new terminus from which the twenty years should run anew: I believe no doubt is entertained in any quarter, that the English statute has tacitly repealed this provision in the Irish statute of 8 *Geo.* 1, c. 4, s. 2, and that the mere prosecution of a suit within the twenty years, no longer prevents the bar from applying.

Now, so long as the Irish statute was in force, that is from the year 1721 to the year 1833, a peculiar motive existed to revive judgments in Ireland, which it is necessary should be understood—for the suing out a *scire facias* to revive a judgment was always held to be the prosecu-

tion of a suit within the meaning of the 2nd section of this statute, and therefore, the suing out a *scire facias* to revive a judgment prevented the bar from applying. So that provided the judgment were revived, to which the suing forth the *scire facias* was a necessary preliminary, once in every twenty years, the non-payment of interest or principal became immaterial, and judgments in Ireland were, therefore, revived in reference to this statute for the mere purpose of preserving them *unbarred*.

But any inducement which the Irish statute could supply for reviving judgments, and the peculiar aid which it supplied to the efficacy of a revivor, are now at an end, in consequence of the repeal of that 2nd section of the Irish act, by the 3 & 4 W. 4, c. 27, s. 40; and if the reviving of a judgment still possesses the effect which it is sought by the judgment creditor in the present case to attach to it, namely, that of preventing the bar from attaching, it must be in consequence of altogether other principles than those to be derived from that Irish statute.

The operation of the act of 3 & 4 W. 4, in tacitly repealing the 8 Geo. 1, c. 4, s. 2, was by many persons in this country considered a matter to be regretted as tending, in their opinion, to impair the security of judgment creditors. With that feeling we have nothing to do. The question for us is, what has the legislature done? On the policy of their views in this respect, it is not for us to pronounce, but it is a question on which opposite opinions may allowably be entertained.

I advert to the feeling of indisposition towards this operation of the late statute as having, perhaps, in some degree contributed to the satisfaction with which the discovery was lately received, that there was a case in the English Reports, decided so long ago as the year 1687, which it was thought might still confer upon the proceeding of reviving a judgment, the very same efficacy which it had just lost, so far as the statute law was concerned, by the repeal of the Irish statute of 8 Geo. 1, c. 4, s. 2;—a case until then unthought of in the argument of this question, and which having escaped the researches of the Bar, was at length brought forward by the industry of the Bench. The case is *O'Brien v. Ram*, reported in 3 Modern, 186; it is also reported in Comberbach, 103; and in Carthew, 30. This was a case in error before the King's Bench in England, brought upon a judgment of the Court of King's Bench in Ireland.

I fully subscribe to the soundness of the decision in that case, but I confess it appears to me to fall very short of establishing the conclusion which is now sought to be deduced from it.

The case was as follows:—a judgment had been obtained against one Elizabeth Grey; she then married O'Brien, and a year having elapsed from the time of obtaining the judgment, a *scire facias* was issued, and a judgment was had against her and her husband. Another year elapsed,

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the wife having in the meantime died, and a *scire facias* was issued against O'Brien the husband.

It was contended on his behalf, that the *scire facias* did not lie, for that though the judgment had been revived against him and his wife, yet that judgment of revivor was not an original judgment, and that the *scire facias* must refer to the original judgment, and that was not a judgment against him but against his wife alone.

The Court of King's Bench in Ireland gave a judgment against him, a writ of error was, thereupon, brought to the Court of King's Bench in England, and the judgment of the Court in Ireland was affirmed;—but one word of the judgment of either the Irish Court, or the English, is not given by any one of the three Reporters who mention the case. We, therefore, can go no further than to say that the arguments relied on by the defendant's counsel did not prevail. In my judgment, it was impossible that the decision in that case could have been otherwise than it was. The husband had married his wife subject to her liabilities; those liabilities were fixed upon him, pending the coverture by a judgment of revivor brought upon the original judgment obtained against his wife, *dum sola*. This judgment of revivor was, as far as he was concerned, necessarily an original judgment against HIM, for it was the first judgment that ever was against him—the judgment which preceded it, and of which it was the revivor, having been solely against the woman who afterwards became his wife.

The decision in *O'Brien and Ram* amounts, therefore, to this, that the judgment so obtained against him during the coverture, might become the subject of execution against him after the coverture had ceased by the death of his wife.

The case must be taken as deciding that a judgment obtained against an unmarried woman, which has been revived against her husband during coverture, shall be considered as an original judgment against him. But I do not see how it can be taken as deciding in a case where there is no husband—nor even any change of parties, that a judgment of revivor is to be taken as an original judgment to all intents and purposes—which is the principle sought by the judgment creditor here to deduce from that case; and it seems almost superfluous to observe, that no decision in that case could touch the question of whether a statute to be passed 150 years afterwards, shall, according to its true construction, be taken to adopt the law established by that decision, whatever it may be, or to overrule it by establishing a new test, irreconcilable with the test which it is said that case supplied.

But this is the very matter now in dispute, the question still remains whether the statute has not in fact said, it is not any such consideration that is in future to decide, but another, namely, when did the right accrue to receive the sum of money, which was secured first by the

original judgment, and secondly by the judgment of revivor? The money being the same, although the judgments may be different, and the sameness of the money being the very test suggested by the act.

The question, whether a judgment upon a *scire facias* brought to revive an antecedent judgment, is to be considered as an original judgment, it is said, is to depend upon whether the suing out the *scire facias* is to be considered as bringing a new action, or whether it is to be regarded as a continuation of the former action. Let us then examine it by that test. On this point there is a distinction in our books of the highest authority, which amounts to this, that for some purposes, but only for some, and not for all, the proceeding by *scire facias* is to be considered as an action.

The earliest authority on this subject is *Littleton*, sections 504 & 505, whose words are as follows:—"Also, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet he may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit* or *fieri facias*, for execution upon such a writ cannot be said an action."—"But if after the year and day the plaintiff will sue a *scire facias*, to know if the defendant can say anything why the plaintiff should not have execution, then it seemeth that such release of all actions shall be a good plea in bar. But to some seems the contrary, inasmuch as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet inasmuch as upon the same writ the defendant may plead divers matters after judgment given to oust him of execution, as out-lawry, &c., and divers other matters, this may well be said an action, &c." *Littleton's* position, therefore, goes no farther than this, that a release of all actions will include a proceeding by *scire facias*. A *scire facias* may, as he says, "be well said an action," that is, where the question is, whether it is to be so included.

Lord Coke's commentary on the passage is exactly to the same effect. But that a *scire facias* is not to be considered to all intents and purposes as a new action, appears no less certain than the doctrine which has just been stated.

Williams, in his edition of *Saunders' Reports* (a), after laying down the general rule, that the *scire facias* is considered in law as an action, goes on as follows:—"However, a *scire facias* upon a judgment is to some purposes only a continuation of the former suit, although upon a recognizance it is always an original proceeding, as where the defendant's attorney, after the plaintiff had obtained an interlocutory judgment, and executed a writ of inquiry, agreed that no writ of error should be brought, and the defendant dying before the return of the writ, a *scire facias* issued against his executors to recover the damages

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"against them, upon which they brought a writ error, the Court held "that inasmuch as the *scire facias* in this case *was not a new action, but only a continuation of the old one*, and brought merely to revive the "former judgment, the executors were bound by the agreement of the "testator's attorney; and as the testator himself, if he had lived, "could not have brought a writ of error, neither could his executors, "therefore, the Court ordered the testator's attorney to non-pros the "writ of error."

And if we turn to the case which he refers to, namely, *Wright v. Nutt (a)*, we find Judge Ashurst thus express himself, the rest of the Court not dissenting,—he in fact giving their judgment,—"This is "not a new action, but a continuation of the old one. It is only a *scire facias* to revive the former judgment."

Perhaps the learned Judge might have been more correct in saying that the *scire facias*, though to be deemed a new action for some purposes, was not to be deemed a new action for the purposes of the motion then before the Court; but it is impossible, looking to the circumstances of that case, to say that is to be deemed a new action to all intents and purposes. The Court expressly says that it is not so for the intents and purposes which they therein had to deal with.

If, then, there are some intents and purposes for which a *scire facias* is not to be considered as a new action, but as a continuation of a former action, the question will still remain here, whether the *scire facias* is to be deemed an original action, in order to defeat the purposes which the legislature had in view, in passing the 3 & 4 W. 4, c. 27?

And if the judgment creditor insists, as he does here, that he is entitled to clothe the *scire facias* with that character which shall tend to frustrate the objects of the legislature, at least the burden is cast upon him of clearly proving his position. An argument has been much relied on by the judgment creditor, which I proceed to notice;—it is said that at the end of nineteen years and a-half, he may bring his action of debt founded upon the existing judgment, and have his judgment in that new action after the twenty years have expired, and that there is no person that can prevent him; and in like manner, that he may sue out a *scire facias* at the end of nineteen years and a-half, and have execution within six months after the twenty years, and that there is no person can prevent him. I fully admit it—but what then? The 40th section will be found to have no wish to prevent him. In the case put, he brings his action or sues out his execution *within the twenty years*, and, therefore, the section does not prevent him from having the fruits of that action or the fruits of that execution. The section only says, that he shall not bring his action, or adopt any other proceeding *after the twenty*

(a) 1 T. R. 388.

years. Let him only attempt to do *that*, and then, according to my argument, he comes in conflict with the provisions of the act, and it appears to me that they are too strong for him.

This argument for the judgment creditor, indeed, has been pushed so far, that it has been said that he may go on for any assignable number of years, making in each year the judgment obtained in the preceding year the foundation of a new action of debt,—but this I wholly deny; I admit that if he is so whimsically disposed, he may do so for the first twenty years, one after another; but the line is there drawn, and in any action which he might bring in the twenty-first year, in my opinion, the questions would arise:—

First, is it the same sum of money which has been the subject of these different actions? *Second*, has any payment been made on the foot of it? *Third*, has any acknowledgment in writing been given of the right? But there is a test to which I have not yet adverted, as to whether the judgment of revivor is to be considered as a judgment in a new action, conferring a new right to recover a new debt; and that is the date from which the priority of the judgment debt is to be computed. We will suppose a judgment confessed to A in 1810, and another to B in 1815, and that A obtained a judgment of revivor in 1820, but that B does not revive. The priority of A's debt, when it becomes secured by the judgment of revivor, shall date from 1810. If it were to date anew from the judgment of revivor, B would have gained priority; but A is well pleased, in such a case, to desert his present argument, and to look behind his judgment of revivor, and to identify the debt which he has recovered by it with the debt secured by the original judgment, as, in reason and justice, it ought to be; but as it could not be, in my opinion, if the argument relied on by the judgment creditor, in the present case, were well founded. It has been contended that the original accruing of the present right to receive the sum of money, cannot be the terminus from whence the twenty years are necessarily to be dated, for that this view would conduct us much too far;—and the case is put by the judgment creditor,—suppose the money is lent on bond in 1810; and judgment not entered until 1819; and execution not sued out until 1825; and he then says, that the construction of the act which is contended for by the judgment debtor in the present case, would prevent the recovery of the money in the case supposed, because, it is said, the present right to receive this money accrued more than twenty years before execution sued out; but the answer is very simple,—the act of parliament would not at all interfere with the creditor in the case so put, for a bond is no lien upon land, and it is only from the time that “the sum of money becomes secured by any mortgage, judgment, or lien,” that the twenty years are to be reckoned, that is, from the year 1819 in the case so supposed.

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There is another view of this case, which it may be right to notice. It has been argued, that the defendant who submits to have a judgment revived against him, is to be taken as an assenting party to the propriety of its being so revived, and that if he has anything to say against the revivor of the judgment, he must say it by pleading to the *scire facias*, or be for ever silent.

Now, the binding effect of the revivor must be admitted, that is, the party, no doubt, must abide the consequences of it; but I deny the position that any assent of the party is to be extracted from the fact of the revivor. The defendant in very many instances having no notice whatever of the revivor.

Take the common case of a revivor upon *nils*, where the sheriff returns, that he has not been able to give the defendant notice. In this case, though the abode of the defendant may be really well known, the practice is, that the plaintiff's attorney goes to the office of the Court, and presents his writ of *scire facias* to the clerk of the prothonotary, who indorses on it two returns, which bear different dates, but which in truth are made at one and the same instant; these are made in the name of the sheriff, but often without the sheriff or sub-sheriff, or any one acting for them, even so much as hearing of them; and which fictitious returns state another fiction equally great, namely, that the defendant has nothing by which the sheriff can make known to him.

In this very common case, the defendant has no notice. The revivor being effected behind his back.

I again admit, that so long as our law shall continue unamended in this particular, the defendant must abide the consequences of this, not very fair, proceeding. But I deny that we are at liberty to found any conclusions on supposed knowledge, or implied assent on the part of the defendant, which it is manifest are rendered impossible by this practice.

Again, when it is said that the defendant may redress himself by pleading to the *scire facias*, let us remember that a defendant circumstanced like the present defendant, can plead nothing except the very pleas which have been pleaded in the present case, namely, the fact of no payment, and no acknowledgment in writing within twenty years, and these, the judgment creditor says, are bad pleas, and, therefore, though true, cannot avail him.

The argument of the judgment creditor, therefore, is in this circle, that if the defendant does not so plead, he is to be excluded from raising any question as to the fact of non-payment, or non-acknowledgment in writing, because he has not pleaded them,—but if he does so plead, he is to be bound equally, because it is then contended, that such facts are altogether immaterial.

This is only giving enunciation in other words, to the proposition

that the power which any plaintiff possesses of reviving his judgment shall exclude (do what the defendant may) all questions being raised as to the fact of non-payment or non-acknowledgment within twenty years. We have heard a great deal of the mischiefs which will follow upon the destruction of vested rights, which it is said that the construction of the statute contended for by the judgment debtor would induce. With that consideration we have nothing to do; but if it were open to us, I should observe, first, that no judgment would be at all affected, upon which it had been possible to realise any payment on account of principal or interest during the last twenty years; and that any judgments of a contrary description were probably securities of no great value, and exactly such as the legislature thought it right to bar; and secondly, that the alleged hardship is no other than is incident to every statute of limitations, which necessarily renders irrecoverable some demand which could otherwise be recovered; a hardship, if it be one, which it is the very object of every such act to create.

It can hardly be necessary to observe, that no antecedent state of the law in Ireland can be allowed to prevail against the statute of the 3 & 4 W. 4, if such antecedent state of the law is irreconcilable with its provisions. And perhaps no other statute ever was enacted, which evinces so much determination to set aside the law that it found established, as the act now in question.

To get rid of ancient law where it had become unsuited to modern convenience, is the character of the statute from one end of it to the other. It has accordingly abolished every form of real action except three. It has annihilated above sixty of the most venerable writs known to our law. It has swept away the doctrines of continual claim and *possessio fratris*, and wholly altered the law respecting the effect of entries, and of discontinuance, and of warranty, and of descents cast, and of the possession of joint tenants and tenants in common, and of permissive occupation, and of adverse possession, and it has altered the periods of limitation, and the conditions under which they apply to remaindermen, and to persons under disabilities. In all these particulars the statute adopts, and carries into execution the recommendations of the First Report of the Commissioners appointed to consider the state of the law respecting real property; but extensive as are these changes, they are not all that were then in the mind of the legislature connected with the subject of that First Report,—for in the same session, they passed two other statutes equally founded on that Report, and equally adopting its recommendations,—by one of which the ancient law of dower was wholly new modelled, and by the other, some of the most fundamental maxims of the law of inheritance were set at nought. What Lord Coke might have thought of these operations I stop not to conjecture, but I may be permitted to express my conviction, that if it had been

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stated to the legislature when they were about to enact the 3 & 4 *W.* 4, c. 27, that the provisions of the 40th section of their act would be subversive of a rule long acted on in Ireland, "*that we must not look behind a judgment of revivor*," that consideration would not have prevented the section from passing into a law. In fine, it appears to me that ancient rule is essentially inconsistent with the plain meaning of the 40th section of the 3 & 4 *W.* 4, c. 27, and that the section meant to suggest a new test for the continuance or non-continuance of a lien upon land, which the application of that former rule would completely nullify. I admit that the state of the law prior to the passing of the 3 & 4 *W.* 4, c. 27, was that which the judgment creditor in the present case contends that it still is: I agree with him that the legislature must be taken to have known that such was the state of our law, but I do not believe they intended to adopt it. On the contrary, I believe that they intended wholly to alter it, and it appears to me that on a true construction of the statute they have succeeded in accomplishing that object, and that the practical question now at issue is, whether the statute shall prevail against the old law—or whether the old law shall prevail against the statute?

For these reasons it appears to me, that the judgment of the Court of Queen's Bench ought to be reversed.

TORRENS, J.

I concur in the opinion of the majority of my learned brethren who have preceded me, and remain unconvinced by the arguments adduced by my Brother FOSTER. It is important to consider the state of the law in this country, previous to the statute of the 3 & 4 *W.* 4, c. 27, what mischiefs that statute was intended to remedy, and what greater mischiefs would ensue from the adoption by this Court of the construction contended for by the plaintiff in error. These considerations appear to me to afford legitimate keys to the construction of an act, upon which there has hitherto been no binding decision, although the three Courts of Law and the Master of the Rolls have, I believe, given their opinions respectively in favor of the construction of this clause of the act contended for by the defendant in error (a). To use the words of the late Chief Baron JOY, in *Crofts v. Hewson* (b), if such a construction were not given to it, "this statute would be a very mischievous one; and we ought, therefore, so to construe the statute as to prevent that mischief."

Securities by judgment in this country stand upon a very peculiar

(a) *Vide Executors of Ottiwell v. Farran*, 6 Law Rec. 2d Ser. 10; S. C. 1 Sausse & Scully, 218, n.; *Keely v. Bodkin*, 5 Law Rec. 2d Ser. 224; S. C. 1 Sausse & Scully, 211; *Crofts v. Hewson*, 5 Law Rec. 2d Ser. 263; *Finch v. Fitzgibbon*, 6 Law Rec. 2d Ser. 312.

(b) 5 Law Rec. 2d Ser. 266.

footing. Previous to the statute 8 G. 1, c. 4, *Ir.*, there was no statute of limitations affecting the recovery of debts due by bond, single bill, judgments, and other such securities. That statute, after reciting that persons had been put to great trouble and expense in defending themselves against actions had against them, "by color of old dormant debts and incumbrances, for which no demand had been made, nor any suits prosecuted," "by the space of twenty years past," proceeds, in the 2d section, to enact, that if any person shall commence or prosecute any action or suit, either in Law or Equity, for recovery of any debt due by single bill or bond, or by judgment, &c., "which shall have been due and payable by the space of twenty years before such action or suit brought, where no action or suit hath been prosecuted for recovery thereof, nor any interest of money hath been paid, or other satisfaction made on account thereof within the space of twenty years before the commencement of such action or suit, the defendant or defendants shall and may be at liberty to plead payment in bar of such action or suit."

That statute passed nearly a hundred and twenty years ago, received an enlarged and liberal construction beyond that which the strict word of the statute would perhaps legally bear, and many inconveniences resulted from a construction which gave an efficacy to proceedings which were neither within the words, nor probably within the meaning of the legislature. Had that statute been strictly construed, the 40th section of the 3 & 4 W. 4, c. 27, need not, in my opinion (so far, at least, as relates to Ireland), have been passed; but from the lax construction given to the former statute, a mischief had crept in, which the provisions of the recent statute, supposing the legislature to have had in view the state of the law in this country, were intended to remedy. Although many cases were let in which were not, perhaps, strictly within the language of the 8 G. 1, c. 4, yet, it never was doubted that judgment in *scire facias* saved the bar of the statute; and, upon the faith of that construction which was in operation for so long a period, securities by judgments revived by *scire facias* became an undoubted lien on the lands of the conusor, having all the effects of the original judgment, with the superadded right of issuing execution on them.

It is indisputable that thus stood the law before the statute of the 9 G. 2, c. 5, which greatly enhanced the value of securities by judgments, by rendering them assignable, vesting in the assignees the rights of the original conusees, and enabling them to revive the judgments, and give discharges in their own names; and, in reference to this subject, it may not be unimportant to advert to the words of the section under consideration, which are, "That no action," &c., "shall be brought," &c., "but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge

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"for or release of the same, unless," &c. Now, under the 9 G. 2, the right of the assignee to receive the money secured by the original judgment, may have first accrued under the judgment of revival, as in the case of an assignment of a judgment, after twenty years from its rendition. Thus, the right of the assignee to receive the money, and give a "discharge for or release of the same," may have been founded, not merely upon the original judgment, but also upon the judgment of revivor in *scire facias*, from which he derived his "present right to receive the same."

This consideration of the law, as it previously stood, may serve to shew that the legislature, at the time of passing the recent statute, had in its contemplation not only the original judgment whereby the debt was secured, but judgments of revivor also. It is rather curious to observe, that the terms "release and discharge" are to be found in both acts, as applied to the persons who have the present right to receive the debt.

In this case there was a judgment of revivor in *scire facias* in Michaelmas Term, 1817, and up to the passing of the 3 & 4 W. 4, c. 27, it is not contended but that this was a valid and subsisting security. To defeat this security, a retrospective operation must be given to this clause of the statute, which, if adopted, will have the effect of defeating not only this, but every other judgment on the records of the Court, which, under the established construction of the 8 G. 1, were considered as valid and binding on the defendants. We are not now called on to decide whether this clause of the 3 & 4 W. 4 be a prospective repeal of the 8 G. 1; but we are required to give the first-mentioned statute a retrospective operation. It would be alarming to contemplate the demolition of property which would follow from the adoption of such a construction. The property of the country is largely invested in this species of security; they may be said to be among the common assurances of this part of the kingdom. It is every day's practice to make judgments the subject of family settlements. They are vested in trustees, whose duty it is to keep them alive for the purposes of the trusts. Until the passing of the 40th section of the late act, the validity of such securities was unquestionable; and unless the words of that section be so clear and unambiguous as to compel the Court to adopt a construction which would have the effect of destroying them, and producing such mischievous consequences, we ought not to do so. I admit, that if the words be so clear and stringent as to admit of no other construction, the Court is bound to give them such a construction, whatever the consequences of it may be. The Court is to administer, not make the law.

It is contended that a rigid construction is to be given to this clause, upon two grounds—first, it provides, it is said, but for two exceptions,

viz., a payment of interest or of part of the principal within twenty years, or an acknowledgment in writing; and secondly, it is said that, in point of law, the term "judgment" does not apply to a judgment of revival in *scire facias*, and that the present right to receive the money "accrues" not on the rendition of the original judgment, but on obtaining the judgment of revival. Now many cases may be put which, although not within the exceptions mentioned in the section, would confessedly prevent the bar. For instance, executions may be sued out on the original judgment, and thus it may be kept alive, year after year, for twenty years, although there may be neither a payment nor acknowledgment; and, surely, it cannot be contended, that creditors who have so issued execution from time to time, and endeavored to obtain their demands, are barred after a lapse of twenty years from the entry of the original judgments. Again, an action of debt may be brought on the original judgment, just before the expiration of twenty years; and after the expiration of the twenty years, final judgment may be obtained in that action. Can it be contended that, in such case, the 8 G. 1 is retrospectively repealed, and that the bar is not prevented by the commencement of the action within twenty years? But in reply to this, it is said that the creditor can continue a suit so commenced before the expiration of the twenty years, and complete it afterwards, by obtaining judgment. But it is impossible to give the statute such a construction; for, according to the argument on the other side, the true construction of its words makes twenty years an impregnable barrier to the recovery, except in cases coming within the two exceptions expressly provided for.

But what is to become of pending suits relating to the validity of original judgments, which may have been pending for years, and in which there has been neither payment nor acknowledgment? Is the efflux of time to determine the rights of the parties in such suits, and not the tribunals to which they have chosen to submit their claims? These are some of the exceptions which may be suggested.

My Brother FOSTER has alluded to the case of mortgages, with respect to which I am of opinion exceptions must be admitted, not expressly coming within the words of the act. I will just advert to the case of a bill taken *pro confesso* and a decree for sale; but I refer this part of the case to the consideration of the learned BARON who is to follow me, and whose great experience in a Court of Equity so well qualifies him for the task.

Indeed, I look upon the question in this case as closed by the authority which has been so frequently referred to, of *O'Brien v. Ram* (a). That case, as it is well known, was first brought to the notice of the profession by the late Chief Baron, in the case of *Crofts v. Hewson* (b). In *O'Brien v.*

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Ram, a person who was not bound by the original judgment, but who, upon his marriage, was made a party by *scire facias*, was held bound, after his wife's death, by the judgment in *scire facias*, which had been issued during the coverture jointly against himself and wife, who was the original party to the judgment. I should be trespassing on the time of the public, were I to allude more at length either to this case, or to that of *Crofts v. Henson* above mentioned.

With respect to the history of this act of parliament, I must protest against its admission here. I know nothing judicially of the Real Property Commissioners, and I cannot permit my mind, so far as it is legally constituted, to be influenced by any considerations arising from their Reports, or by any conjectures as to what the legislature may have thought proper to enact in consequence of their recommendations.

The preceding considerations would have led my mind to adopt the construction contended for by the counsel for the defendants in error; but even if those considerations were not deserving of the weight to which I think them entitled, I do not entertain much doubt upon the express wording of the statute itself, and the true meaning of the word "judgment," that the decision of the Court of Queen's Bench ought to be affirmed.

I conceive the judgment of Michaelmas Term, 1817, ought to be viewed in the light of an original judgment. In my opinion, there is nothing in the wording of the 40th section that prohibits such a construction. That clause speaks of "*any mortgage, judgment, or lien.*" Now, carrying forward the word "any," and reading it "any judgment," or "any lien,"—as the sense and context require—and a judgment of revivor is brought within the express words of the act:—for it has not been disputed but that, for some purposes at least, a revivor by *scire facias* is to be considered as a "judgment."

Both in this country and in England (although there may be some difference in the form of pleading), a *scire facias* has been considered an action to which a plea may be put in, and in which a judgment may be recovered. If that be so, why should not a judgment by default bind the party in it just as much as in any other action?

It is unnecessary to say anything upon the question of pleading—indeed, that part of the case was not much pressed at the bar.

Upon the whole, I am of opinion that the judgment of the Court below ought to be confirmed; and I conceive that an opposite decision would lead to a great destruction of property.

PENNEFATHER, B.

Concurring as I do in the opinions expressed by the majority of my Brethren, and in the decisions which have already taken place upon the construction of this statute, and being, moreover, strongly impressed with the mischievous consequences which would flow from a contrary

decision, I would now have contented myself with merely saying, that, in my opinion, the judgment of the Court of Queen's Bench ought to be affirmed, had not certain matters been urged in the course of the argument and discussion of this case, which appear to me to require some little observation.

It is a startling proposition, that after a Court of justice has declared and adjudged that a debt is unsatisfied—that the plaintiff is entitled to have execution for that debt, which has, in fact, never been satisfied or paid—I repeat, it is a startling proposition, that the solemn judgment of the Court, given under such circumstances, is to be set at nought, and its adjudication treated as a nullity and of no effect. Still, however startling such a proposition may be, if the legislature have said that such is the law, we must undoubtedly yield our obedience, whatever may be the consequences—whatever ruin it may entail upon individuals—or whatever destruction it may occasion to their property.

But I must be permitted to say, that before we adopt a construction that would lead to such results, we ought to be fully satisfied that such was the intention of the legislature, and that such intention has been clearly and explicitly expressed. That intention ought, in my mind, to be collected from the act itself—from what the legislature has said, either in its recitals or in its express enactments, and we ought not too much to look out of the statute to what learned men may have said or thought antecedently to its passing.

The history of acts of parliament is sometimes referred to. In the construction of old statutes, cotemporaneous exposition is sometimes of the greatest value; but we are not to go too far in attending to what has been said or done before the legislature has put its *fiat* upon the enactment, and before the measure has become the law of the land. What has been previously said or done may have been altered, or, possibly, altogether abandoned, before the contemplated measure has passed into a law; and we ought, therefore, to look mainly to the language of the legislature itself, to find out and interpret its meaning.—Though perhaps I may be permitted to say, that there is not anything in the Report referred to, that would lead to a conclusion that, in the opinion of the Commissioners, a judgment in *scire facias* was to lose, by the adoption of what they recommended, any of the effect it had theretofore possessed.

The intention, then, of the legislature upon this subject is to be collected, as it appears to me, from the enactments contained in the 40th section of the statute, for there are no recitals which can be read in connexion with this section to assist us in our construction of it.

In construing that section, we are bound to consider what the law of the land was previously—what the nature of the writ of *scire facias* and judgment on it—what it is probable the legislature intended to do—and

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what are the words they have used to carry that intention into effect.

It must be conceded that the strict words of this section are not to be considered as binding in every case, but that certain exceptions are necessarily to be considered as engrafted on them. Some of these exceptions have been pointed out by my learned Brethren in their judgments, and others by counsel in argument at the bar. I will only advert to one—the case of an execution issued from year to year; and although all the mischiefs which are attributed to the revival of judgments by *scire facias*, will be found to follow from keeping them alive by repeated executions, yet, no one will dispute, that if an execution issues from year to year, the judgment may be kept alive for a century.

Let us see what is the nature of a judgment in *scire facias*, and what is the effect to be attributed to it. It is not merely the adjudication of the Court that the plaintiff shall have execution of his former judgment, but it may bind and affect persons who were not parties to the original judgment. It has the effect, therefore, not only of reviving the former judgment, giving a new right to receive what is due on it against those formerly bound by it, but of enabling the party to enforce his demand against others. It does this by the judgment of the Court, and, in doing so, it confers a new privilege, a new right, and a new terminus.

It is said, however, that time begins to run from the moment the money secured by the judgment is first payable, and great reliance has been placed on the words of the section in this regard;—but see the length to which this argument would go: it has been already alluded to by my Brother PERRIN. If the judgment in *scire facias* do not give a right to receive the money, neither does the original judgment. The right to receive the money, is first given by the bond or other security, and time, according to this argument, ought to run from the moment the bond is payable.

Suppose a bond and warrant of attorney are given to secure a sum of money—at the end of nineteen years, judgment is entered on the bond—six years after that, a *scire facias* issues. Is that judgment, I would ask, barred, because a right to receive a sum of money existed for more than twenty years? A “present right” to receive the money was created by the bond, and existed immediately upon its execution, or, at least, at the period when it was made payable, although the judgment was not entered for nineteen years afterwards.

But it is said that the sum of money was secured by the bond, and that the bond was no lien on the land. True, but the right to receive the money, in the words of the clause, first accrued under it, but a new right binding the lands accrued by the original judgment, and a further right to receive the same by the judgment of revival, a right which this latter judgment might have conferred on one no party to the original

judgment. If the judgment of revival do not confer a new right to receive the money, neither does the original judgment. They both stand on the same foundation—they are equally the judgments of the Court—they equally bind the land.

The judgment in *scire facias* secures, by the judgment of the Court, the same sum that was secured by the original judgment, but it also gives a fresh security—a new present right to receive the money originally secured by the bond, then by the entry of the original judgment, and lastly, by the judgment in *scire facias*.

Again, a party suing out a *scire facias* is entitled to costs. These may be considerable. Suppose a judgment for the plaintiff in *scire facias*, after proceedings in which costs to a large amount have been incurred. The judgment is given that the plaintiff shall recover not only the sum comprised in the original judgment, but a sum for the costs of the judgment in *scire facias*. The plaintiff is clearly entitled to recover these costs at any time within twenty years, though many more years have elapsed since the rendition of the original judgment. Shall he, then, be at liberty to recover the accessory, and not the principal, because a right to receive the latter existed for more than twenty years? He *cannot* recover the sum secured by the original judgment, although the Court has adjudged it to him, but he may recover the costs of suing to obtain the fruitless adjudication. Must we split the judgment in a *scire facias*, and let the plaintiff recover the costs, and not the sum of money for the recovery of which those costs have been incurred? Is execution, I again ask, to go for the accessory, and not for the principal?

The legislature has introduced into the 40th section two exceptions, viz., where there has been a payment of money, or a promise in writing; but as it must be presumed that it knew the law of the land, it was thought unnecessary that an exception should be introduced in favor of those cases in which execution had been issued, or an adjudication of a Court obtained.

It was not contended by the defendant's counsel that there was any difference as to the effect and operation of a judgment in *scire facias* had upon *nil dicit*, confession, on a demurrer, or otherwise; and I think it must be conceded, that whatever may have been the foundation of the judgment, whatever may have guided the Court in its determination, the consequences must in each case be the same. The *scire facias* requires the defendant to shew cause why the plaintiff should not have execution of the judgment still remaining unsatisfied. He comes in and says that he can shew no cause, that he confesses that the judgment is unsatisfied. The Court, thereupon, adjudges that the plaintiff shall have his execution—this at the end of nineteen years. Is this confession on record, this adjudication on such confession, to go for nought?—And is

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the original judgment to be considered as barred in the following year, although an acknowledgment in a letter would have kept it alive?

An argument has been drawn from the instance of a mortgage, and it is said that as the mortgage would be barred at the end of twenty years, if no interest had been paid or acknowledgment given within that period, that the same words, when applied to judgments, ought to receive the same construction and have the same effect. I do not deny this; and I think that judgments and mortgages are to be governed by the same rule, and that as a judgment of revival in *scire facias* confers a new right to have execution upon the original judgment, so a decree of a Court of Equity, ascertaining the principal and interest due upon a mortgage, and ordering payment, confers a new right, and forms a new terminus, from whence time is to be computed.

If we examine the principles by which Courts of Law and Equity are guided in their respective proceedings, we shall find a very close analogy between them, and the statute expressly affecting the proceedings in each. It may not be amiss to examine this analogy. If nothing be done with respect to a mortgage, it is barred after the lapse of twenty years; and, in like manner, if nothing be done with respect to a judgment, it is equally barred.

If a *scire facias* be sued out at law, upon which a judgment is had, I have endeavored to shew that it creates a new right and a new terminus, from which the time begins to run. If a suit be instituted within twenty years, for the purpose of raising the sum due on a mortgage, and a decree obtained, ascertaining the amount due, and ordering payment thereof, and, in default of payment, a sale to satisfy the debt, and before any fruit be had from this proceeding, the suit becomes abated, and twenty years elapse from the date of the mortgage; it becomes then necessary to take a step to have the benefit of the former proceedings and decree. For this purpose, a bill of revivor is filed, or a supplemental bill, as occasion may require, say within two years after the former decree, or twenty-one years after the execution of the mortgage, on which no interest had been paid. Is this new suit barred by the statute? Suppose the former decree was made on admissions contained in the defendant's answer, that the whole mortgage debt was due—or suppose it made upon a bill taken *pro confesso* for want of an answer, is the effect still the same? And is the debtor the mortgagor? And is the mortgagor to be protected by the statute, and a mortgagee to lose his debt, although the justice of it was admitted by his debtor, and although the creditor had prosecuted his rights, obtained a decree of a competent tribunal for ascertaining and enforcing those rights, and was rendered unable to enforce that decree by matters over which he had no control—the will of God, or, perhaps, the act or misconduct of the defendant in secretly conveying away the property?

As a suit in Equity is the proper proceeding to get the fruits of a mortgage, and a *scire facias* for obtaining the fruits of a judgment, the same effect and consequences seem clearly to be attachable to the decree in the one case, and to the judgment in *scire facias* in the other, each being the consummation of the respective proceedings.

I do not wish to advert at any length to the situation of property in Ireland, where it has for many years been the habit to advance money on the security of judgments, and which are made the provision for families in innumerable instances, and which have been considered to have been permanently kept on foot by judgments of revival. I will, however, put one case, which is of frequent occurrence:—A man about to marry confesses a judgment to trustees for the purpose of securing a provision for his wife and children. The bond on which the judgment is entered is payable immediately to the trustees, and they have a present right to receive the money secured by the judgment; but, by the terms of the settlement, no interest is, in fact, to be paid by the husband during his life. The husband lives above twenty years—Is the judgment barred? How is it to be kept alive? Not by the payment of interest, for the debtor pays no interest during his life; and unless it is to be argued that this passive state on his part is a payment within the words of the 40th section, and unless the trustees are from time to time to issue execution from which no fruits are to be expected, or from time to time receive written acknowledgments from the debtor, which it is improbable they will do, the judgment may be barred by the operation of this section, if it be not duly revived by a judgment in *scire facias*, and if efficacy be not given to such judgment of revival.

But, it is said that the legislature must have had in view the provisions of the Irish act, 8 G. 1; and that, impliedly, repealing some of the provisions of that act, by the 3 & 4 W. 4, it has gone further, and taken away the efficacy of a judgment in *scire facias*. This intention, however, can hardly be attributed to the legislature. Under the 8 G. 1, the mere suing out a writ of *scire facias* within twenty years prevented the operation of that statute. Now, although the 3 & 4 W. 4, c. 27, may have repealed this enactment, it did not affect a judgment given on such writ of *scire facias*.

A judgment in *scire facias* neither derives its operation from the 8 G. 1, nor is it affected by its implied repeal.

It, therefore, appears to me very clearly (with every respect for my Brother FOSTER's opinion, and for the very able manner in which he has discussed the case), that the most alarming consequences would follow from the construction he contends for, and that that construction is neither within the spirit nor the letter of the act, and that such a construction would be giving to this clause an operation destructive of rights which, as I apprehend, the legislature never intended to destroy—

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an operation which, I go the length of saying, ought not to be given to the statute, unless the words be so clear that no person could entertain a doubt as to their interpretation.

In reference, again, to judgments of revival, I would remark, that the late statute 9 G. 4, c. 35, seems to consider fully and to recognise the efficacy that ought to be given to such judgments.

I do not go at greater length into this case, as it has been already so ably discussed, by some of my Brethren here present, in the lucid judgment already given in the case in the Court below, and also by other Judges before whom the question has arisen, and shall only further say, that I fully concur in those judgments, and think the judgment of the Court of Queen's Bench ought to be affirmed.

BURTON, J., JOHNSON, J., DOHERTY, C. J., and BUSHE, C. J., concurred in the opinion of the majority of the Court.*

Judgment affirmed.

Moderate costs.

* The CHIEF BARON and BARON RICHARDS were absent: but the same question having arisen before the latter learned Baron, in the case of *Ryan v. Cambie* (for which see *Ir. Eq. Rep.*), vol. 2, was de-

cided by his Lordship on a previous day in this Term, in exact conformity with the opinion entertained by the majority of the Court in the principal case.

QUEEN'S BENCH.

*Monday, November 12th.*WILL—CONSTRUCTION OF—FEE-SIMPLE ESTATE—
ESTATE FOR LIFE—POWERS.

BOWYER v. BLAIR.

THE following case was sent from the Court of Chancery, for the opinion of the Court of Queen's Bench:—

Charles Frederick Abbott, Esq. being seized in fee of certain freehold premises in the barony of East Carberry and Kinalmeaky, and county of Cork, did, on the 6th of January, 1811, duly make and publish his last will and testament, in writing, duly executed and attested, for passing freehold estates, which will is in the words and figures following, that is to say:—"In the name of God, Amen.—I Charles Frederick Abbott, "of Church-lane, in the parish of St. Luke, Chelsea, in the county of "Middlesex, Esq., being sick and weak of body, but of sound mind, "memory, and understanding, do make this my last will and testament in "manner following (that is to say)—First, I desire that all my just debts "and funeral expenses be paid and satisfied, and I give, devise, and "bequeath all that my freehold estate, situate in the baronies of East "Carberry and Kinalmeaky, and in the county of Cork, in Ireland, with "the appurtenances, unto my friends Morris Hughes and Robert Horn, "both of Chelsea, aforesaid, their heirs and assigns, to hold to them, "their heirs and assigns, from and immediately after my decease, upon "the trusts following (that is to say), upon trust to receive and take the "rents, issues, and profits thereof, and to pay and apply the same unto "my dear wife Mary Anne, for her own sole and separate use, notwith- "standing any future husband she may marry, and that her receipt "only to my said trustees shall be good and effectual discharges, from "time to time, for the same, and from and immediately after the decease

Where the tes-
tator being
seized in fee of
certain free-
hold premises,
devised same
to trustees,
their heirs, &c.
"upon trust,
to receive and
take the rents,
&c. thereof,
and pay and
apply the same
unto my dear
Mary Anne,
for her own
sole and sepa-
rate use, not-
withstanding
any future hus-
band she may
marry, and
that her receipt
only to my
trustees shall
be good and ef-
fectual dis-
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time to time for
the same, and
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mediately af-
ter the decease
of my said dear
wife, in trust
for such per-
son or persons,
and in such

manner and form as my said dear wife shall, by any deed or will duly executed and attested, give, direct, and appoint the same; and I give, devise, and bequeath unto my said dear wife, all and singular my goods, chattels, monies, debts to me, monies in the funds, and effects and property, of what nature or kind soever the same may be, for her own sole and absolute use for ever." And he then appointed his wife sole executrix of his will.—*Held*, that under the clause of the will which terminates with the words "direct and appoint the same," the testator's wife took in the freehold premises thereby devised to her an estate for her life only, with a power of appointment by any deed or will duly executed and attested, supposing such estate or interest to be legal, and not equitable. *Held, also*, that under the clause of said will, commencing with the words, "And I give, devise, and bequeath unto my said dear wife," she took an estate in fee-simple in said freehold premises, contingent upon her not exercising the power of appointment given to her by said will, and supposing such estate to be legal, and not equitable.

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"of my said dear wife, in trust* for such person or persons, and in such manner and form as my said dear wife shall, by any deed or will, duly executed and attested, give, direct, and appoint the same. And I give, devise, and bequeath unto my said dear wife Mary Anne, all and singular my goods, chattels, monies, debts to me owing, monies in the funds, and effects and property of what nature or kind soever the same may be, for her own sole and absolute use, for ever; and I nominate, constitute and appoint the said Morris Hughes, Robert Horne, and my said dear wife Mary Anne, the sole executors and executrix of this my last will and testament, hereby revoking and making void all former and other wills by me at any time heretofore made, and declaring this only to be my last will and testament. In witness whereof," &c.

This will was dated the 6th of January, 1811, and was attested by three witnesses; and the testator died on the said 6th of January, without having altered or revoked said will, leaving the said Mary Anne Abbott and the said Morris Hughes and Robert Horne him surviving.

The questions for the opinion of the Court were—first, What estate or interest (if any) did Mary Anne Abbott take in said freehold premises under the clause in said will which terminates with the words "direct and appoint the same," supposing such estate or interest to be legal and not equitable? Second, What estate or interest (if any) did the said Mary Anne Abbott take in the said freehold premises under the clause in the will commencing with the words "and I devise and bequeath unto my said dear wife," and supposing such estate or interest to be legal, and not equitable?

Mr. *Collins*, Q. C., for the plaintiff.—We contend that if a will give an estate to one indefinitely, with a superadded power of appointment that the devisee takes the fee, it is otherwise in an express devise for life. The rule is laid down with great precision by Sir William Grant, in the case of *Bradley v. Westcott* (a)—"The distinction is, perhaps, slight between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will; but that disposition is perfectly established, that in the

(a) 13 Ves. 453.

* This passage in the original will was as follows:—"And from and immediately after the decease of my said dear wife, then I direct my said trustees to convey the said freehold estate unto such person or persons, and in such manner and form as my said dear wife shall, by any deed or will, duly executed and attested, give, direct, and appoint the same."

"latter case the property vests." The principle seems to have prevailed almost since the Statute of Wills. The rule and the distinction are both established in the case of *Jennor v. Hardies* (a), and in the earlier case of *Anon.* (b). In the case of *Goodtitle v. Otway* (c), the Court said the latter case was not law. In 1 *Sugd. on Powers*, 124, all the cases are reconciled under the two following propositions:—First, "That when there is an express estate for life given, with a gift in default of appointment generally, as the devisee shall appoint, without any intervening estate to strangers, the devisee shall take for life only, with a power of disposition over the inheritance. The rule is more inflexible when a specific mode of exercising the power is pointed out." Secondly, "When the estate for life is given in order to let in estates to strangers, and no specific mode is required to the disposition of the inheritance, there, in the event of the mesne estate not taking effect, the devisee shall take the entire fee-simple." I have met no case where the limitation to the devisee was indefinite, with a power of disposition superadded, and it was held that the devisee did not take the fee. The present case comes quite within the authorities, and the plaintiff is entitled, upon them, to the certificate of this Court. In *Elton v. Shephard* (d), the words are the same as in the present case, and it was held they gave the absolute property. In *Doe d. Herbert v. Thomas* (e), the words are indeed somewhat different, but the judgment of Lord Denman shews clearly his opinion on this question. His Lordship says, that "his judgment would have been the same, though the word heir did not occur; the only doubt which he felt arose on the case in 3 *Leonard*, but that clearly does not apply;" and same principle established in *Barford v. Street* (f). As to the construction to be put upon the second clause of this will, the result of the authorities is, that a wide construction is to be given to the word "property;" and all the cases which are apparently to the contrary, are either inapplicable, or have been since expressly overruled. The case of *Roe v. Yeud* (g) is against our view; but, then, Sir J. Mansfield, C. J., says, "nor is there one provision throughout the will which has the least relation to real estate." In the present case, I conceive, if any thing of realty was undisposed of in the first clause, it would pass by the second clause. The case of *Doe v. Rout* (h) is also against us; but in that case, Gibbs, C. J. observes, that there was no clear intent to dispose of her real estate. The true principle of construction is thus laid down in the modern case of *Church v. Mundy* (i), "The best rule of construction is, that which takes the words to comprehend a subject that falls within their usual sense, unless there is

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(a) 1 Leon. 283.

(c) 2 Wilson, 6.

(e) 3 A. & El. 127.

(g) 2 New R. 221.

(b) 3 Leon. 71.

(d) 1 Er. C. C. 131.

(f) 16 Ver. 135, 139.

(h) 7 Taun. 82.

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"something like declaration plain to the contrary." In *Bridgewater v. Duke of Bolton* (a), the Court said, "If the words had been all his estate, 'there is little doubt the fee-simple would pass.' And in *Nicolls v. Butcher* (b), Sir William Grant says, "That in many of the cases the 'Judges have explained the meaning of the word estate, by saying it 'means the absolute property.' Now, if 'estate' is to pass all, because it means 'property,' it would be strange that the word 'property' should not pass the real estate.—[CRAMPTON, J. The meaning must be gathered from the context.]—In *Hogan v. Jackson* (c), it was held that effects, real and personal, could not be confined to chattels real, but would pass the real estate; and Mansfield, C.J. says, "If effects means property, 'the matter is decided.' This illustrates my general proposition, that property is a word of most general import. In *Doe v. Laimch-bury* (d), the devise was of all the residue of the testator's money, stock, property and effects of what kind soever, and this devise was held to pass realty.—[BURTON, J. In that case there are residuary words; there are none in the present case.]—In *Doe v. Langlands* (e), there was a devise of "All and every the residue of my property, goods, and 'chattels;" and it was contended at the bar, that the word "property" was to be construed by the words "goods and chattels," which immediately followed; but Lord Ellenborough held it was to be construed as if "property and goods and chattels." This case is very important, as not merely shewing the general import of the word property, but also furnishing an instance where it was not restricted by the context. In *Doe d. Morgan, v. Morgan* (f), in the earlier part of the will in that case, the testator was only dealing with personalty; and, in his judgment in that case, Tenterden, C. J. said, "As the word property, *per se*, has 'been held to include both real and personal estate, and as there is 'nothing in this will to shew that it is used in a more confined sense, I 'am of opinion that the real estate did pass by it." Bayley, J. says, "in one case, land was held to pass under a devise of personal estate." In *Doe v. Langlands*, it was held that the word "property," when used in a will, would pass the real as well as the personal estate; and if there are other expressions in the will which raise a judicial doubt, only as to whether the testator intended to confine the word property to his personal estate, I think these expressions ought not to control the effect of the word property." And Holroyd, J. said, "Property *per se* is sufficient 'to pass the real estate." In 2 *Powell on Dev. by Jarman*, 171, referring to this case of *Doe v. Langlands*, "The last two cases are important authorities, and they fully illustrate the observation before made, as to the 'leaning of modern Courts to hold lands to pass under words capable of

(a) 6 Mod. 106.

(c) Cow. 299, 304.

(e) 14 East, 370.

(b) 18 Ves. 195.

(d) 11 East, 290.

(f) 6 B. & C. 512.

"comprehending them, notwithstanding their association with personal chattels," &c. "A review of the preceding statement of the cases will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction was adopted." In *Edwards v. Barnes* (a), Tyndal, C. J. in his judgment in this case, which was not at all a residuary, but an absolute and substantial devise, says, property is sufficient to pass whatever a testator possesses; and Bosanquet's judgment suggests what is in the present case, the word "and" connecting the word "property" with words sufficient to give the whole personal estate; and upon this subject there is the following passage in 2 *Powell on Devises*, 164—"This always affords an argument for making the words under consideration include land, since the contrary construction induces them to silence." In *Tilly v. Simpson* (b), testator gave and bequeathed "All the rest and residue of his money, goods, chattels, and estate whatsoever to his nephew;" and it was held that "estate" was not restricted. The arguments were conformable to those in *Hopewell v. Ackland* (c). In the present case, you must entirely nullify the force of the word property, unless you hold it to pass the real estate. The case of *Doe d. Evans v. Evans* (d) is strong for applying the "*ejusdem generis* rule," were such rule properly applicable in the construction of wills; but in Lord Denman's judgment, the following passage occurs:—"All the other words in the clause, but estate, apply exclusively to personal property, and include every species of it; this word, therefore, must be held to apply to any other property the testator was possessed of." And in the present case, supposing the rule *ejusdem generis* good, what is there to cut down the word property? There is a complete sentence terminating at the word "effects." The word residue does not indeed occur in the will in the present case, but some of the cases I have cited, as *Edwards v. Barnes*, are cases where the words do not occur in a clause technically residuary; and for what purpose are the concluding words, "for her own sole and absolute use for ever," words of perpetuity, introduced? Surely the testator must have intended to give, by them, something more than mere perishable chattels. Bayley, J., when giving judgment in *Doe d. Morgan v. Morgan*, says, that a subsequent doubtful expression in the will should not control the meaning of the prior clause giving all his property to his brother. The case of *Arnold v. Arnold* (e) answers the objection which has been thrown out, that there should be some intention indicated of disposing of such *residuum*. For the meaning of the word residue, I would refer to the cases of *Barclay v. Collett* (f), *Goodright v. Devonshire* (g), and *Doe v. Fossick* (h). Some dealing with realty

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(a) 2 Bing. N. C. 252.

(c) Comn. R. 163.

(e) 2 Mylne & K. 365.

(g) 2 Bos. & Pul. 600.

(b) 2 T. R. 659, note.

(d) 1 Perry & D. 472.

(f) 4 Bing. N. C. 668.

(h) 1 B. & Ad. 186.

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in the first clause may be relied on, as if realty was not in the testator's view in the second clause; but in the last case, Tenterden, C. J., said, "It is not necessary that testator should have a "distinct property or interest in his contemplation when framing the "residuary clause; and in *Lessee of Crowe v. Noble* (b), BUSHE, C. J., said, "It is not necessary to ascertain that the testator contemplated a "particular estate." The objection may be raised, why give the fee, when she has a life interest and a power of disposition? But the answer is simple: the testator contemplated a future marriage by the devisee; and the cases recognised the propriety of such a disposition. In *Downes v. Simpson* (c), the lady was to have the fee; but if she had the fee twenty times over, and married without the power, she could make no disposition during the coverture. On the authorities, therefore, the Court is bound to take the words in the present will in their natural signification. At the present day, Judges are not to be astute in favor of the heir-at-law; the rule is, that every thing shall pass by sufficient words, and the adversary must prove the negative. Therefore, in the concluding words of the judgment in *Crowe v. Noble*, "Here "are sufficient words to pass the reversion, and there are none sufficient, "either expressly or by implication, to exclude it."

Thursday, November 15th.

Mr. Blackburne, Q. C., with whom was Serjeant Jackson, for the defendants.—The defendants represent, and have a right, upon this argument, to insist upon the title of the heir-at-law of the testator Charles Frederick Abbott. The plaintiff claims as heir-at-law of the devisee; we represent a person whose rights can only be affected by an express devise, or by necessary implication. The first clause in the will relates to the real estates in the county of Cork; the second clause, it is contended on behalf of the plaintiff, relates to the same real estates; and Mr. Collins has divided his argument into two parts:—First, that this estate passed by the first clause; and secondly, that it passed by the second clause. If it passed by the first clause, it could not pass by the second; and if there be any thing in the argument that it passed by the second, that must be preceded by a distinct determination that it did not pass by the first clause. If there be any doubt whether or not the estate passed by either of these clauses, we will be entitled to the benefit of that doubt. We contend that the real estate passed neither by the first or second clause. There is no general declaration of an intention to dispose of all his worldly estates. There is in the first clause a complete disposition to uses—a use executed in the trustees to continue until

(a) 1 B. & Ad. 186, 189.

(') Smith & B. 29.

(c) 4 Russ. 334.

the death of his wife, and a distinct limitation of the trusts, to terminate on her death, and *then* (this is the time in the testator's contemplation), the trustees to stand seized, to the use of such persons as she should appoint, that is, she has the power of limiting the use. It cannot be argued that the trustees take any greater estate than for her life; or, if she did not make any appointment, that they would not stand seized for the heir-at-law. Mr. *Collins* contends that the limitation to her is indefinite, and that when that is the case, subsequent words of powers are words of limitation; but he must admit, that if the estate be a particular estate, the words must only operate to give the power. Taking that for granted, is the first estate indefinite? The estate is first for her life, secondly to trustees for her life; and, therefore, this is plainly an estate for her life, upon the authority of *Morant v. Gough* (a); in which case Bayley, J. says, "It is a general rule, that a devise to trustees ceases "as soon as the purposes of the trust are at an end." The case of *Bradly v. Westcott* (b) is an authority upon this point; and the language in 1 *Sugden on Powers*, 123, upon the distinction between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will, is, that "that distinction is perfectly established;" and for that position relies upon the case of *Reid v. Shergold* (c), decided by Sir W. Grant; and in *Adamson v. Armitage* (d), Sir W. Grant lays it down, "That in a devise "of realty, words of limitation must be added, to give more than an estate "for life; but in case of personalty, words of qualification are required, "to restrain the extent and duration of the interest." In 1 *Sugden on Powers*, 121, this case is put—"Suppose an estate to be given to A. "expressly for life, with remainder to such persons, &c. *generally*, as he "shall appoint, will the devisee in that case take a fee?" And then cites the case of *Anon* (e), where the lands were devised "to the wife for life, "and, after her decease, she to give the same to whom she will;" and it was determined that she took for life only, with an authority to give the reversion to whom she pleased. In the present case, it is to be remarked, the power to dispose is by deed or will, and not generally; and if the will be not duly attested, the heir-at-law must take. In *Jennor v. Hardies* (f), the power was general; and in *Goodtitle v. Otway* (g), the decision went upon the ground that the devisee was also heir-at-law. In *Bradley v. Westcott*, the gift was of personal estate, and upon the ground that the power was to be exercised by will, it was held that only an estate for life was given. Here we have concurring, an estate restricted to the duration of a life, and a power limited to two modes of

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(a) 7 B. & C. 206.

(c) 10 Ves. 370.

(e) 3 Lev. 71.

(b) 13 Ves. 445.

(d) 19 Ves. 418.

(f) 1 Lev. 283.

(g) 2 Wils. 6.

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exercising it—to an exercise of it by deed or by will. It is impossible to put a double construction upon the clause; it cannot be estate and power. Now, if an estate, she cannot in a certain event dispose of it by deed or will, and the testator's intention is defeated. The case of *Barford v. Street* has been relied on, and any one reading the marginal note would be misled; but the words of Sir W. Grant shew that he founded his decision in that case upon the extent of the power given, for he says, "By this unlimited power, she can appoint the inheritance." In the case of *Doe d. Herbert v. Thomas (a)*, which was also relied on, the words "heirs and assigns" were in the devise, and the whole point of the decision in that case is, that where an absolute interest is given, the words of a power will not limit the gift. The case of *Irwin v. Farrer (b)* was the case of an unlimited power already exercised, and the subject matter of the gift a legacy, and therefore inapplicable to the present case. If I am right, the estate was given absolutely to her during her life, and also a power given to her to dispose of the whole, or any part of this property, without the assent of any after husband, as a *feme sole*. By the first clause, he had made the most ample provision for his wife; and, so far as intention, nothing, beyond what he did, remained for the testator to do.—[BURTON, J. If not disposed of?]
 —It descended to the heir-at-law. If she disposed of the entire, the second clause would have nothing to operate upon. If it operated at all, it would be upon what she did not dispose of; and they say that the use of the word "property", is, that it is a contingent residue of the estate that this clause is to operate upon. Two distinct classes of cases have been brought to establish that position; the first to shew that the word "property" applies to real estate; the next, that class of cases which relate to residuary devises. What is now to be disposed of is a residuary property, but a part of that of which there has been some disposed of by the instrument. In the present case, there is not one word of "rest" or "residue," or any word referring to any thing of which some part was already disposed; and there is no case in which, standing alone, the word "property" has been held to mean a contingent residue of this kind. With respect to the case of *Lessee of Crowe v. Noble (c)*, there was a residuary clause in that case; and that that was the foundation of the judgment, appears from the reference by BUSHE, C. J., to the case of *Goodright v. the Marquis of Downshire (d)*. There is not a phrase in the present clause to include that which they say is to pass by the will. Cases have been cited to shew the meaning of the word "property," but none of them shew this, that the word property *per se* has ever been held sufficient to dispose of the undisposed residue of an estate before partly disposed of. In the case of *Hope-*

(a) 3 Ad. & E. 123; S. C. 4 Nev. & M. 696.

(b) 19 Ves. 85.

(c) Smith & B. 12, 33.

(d) 2 Bos. & P. 600.

well v. Ackland (a), the words, "whatsoever else I have in the world not "before disposed of by me," occur; and every one of the cases which have been referred to, and all of which are to be found in 2 *Powell on Dev.* 165, had the very expression which the present case wants; and they all had antecedent dispositions of the real or personal estate, and relative words, as "rest or residue;" and therefore, by necessary implication, the latter disposition meant residue. The case of *Doe d. Morgun v. Morgan* (b) was not the case of a residuary or reversionary estate at all; nor does the case of *Edwards v. Barnes* (c) apply to the present: for the words in that case, "all other my property whatsoever and wheresoever," manifestly words of reference, not one of which exist in the present case. The devise here is a substantive one, not referring to any other disposition in the will, and attending to the circumstance that the word "property" means what his wife would not dispose of, the testator is made to give a reversion to his wife, free from the control of any husband she might marry, which she is to take after her death. The words "for her sole and absolute" use, in the second clause, are sufficient to give her the estate for her separate use; and it is so laid down by Sir W. Grant, in *Adamson v. Armitage* (d). If, upon the will, I shew a reasonable doubt, the heir-at-law must succeed; why should the testator give his wife property as undisposed of, when he has given her absolute power over it before? Where has the word "property" been held to carry the undisposed residue against the heir-at-law? The intention of the testator was to give her the real estate, in the first clause of the will, and never to make a disposition of it afterwards; and not to touch the personal estate, to which the second clause refers.

Serjeant *Jackson* followed on the same side, and cited the following additional cases, as to the first clause giving the devisee substantially all the power given by the second:—*Jones v. Clough* (e); as to the effect of superadding a power upon the gift, *Daniel v. Uply* (f); *Anon* (g). 1 *Sug. on Pow.* 121; *Nannock v. Horton* (h); *Tomlinson v. Dighton* (i); *Doe d. Thorley v. Thorley* (k); *Wilson v. Major* (l); *Briden v. Hewlett* (m); as to words which will disinherit the heir-at-law, *Timewell v. Perkins* (n); *Camfield v. Gilbert* (o); *Berry v. Usher* (p); *Roe d.*

(a) Comyn R. 164.

(b) 6 B. & C. 512.

(c) 2 Bing. N. C. 252.

(d) 19 Ves. 419.

(e) 2 Ves. Sen. 365.

(f) *Lache's R.* 9, 39, 134; S. C. Sir W. Jones, 137, and Noy's R. 80.

(g) 2 Keeling C. C. 6.

(h) 7 Ves. 391.

(i) 1 P. Wms. 149.

(k) 10 East, 438.

(l) 11 Ves. 205.

(m) 2 Myl. & K. 90.

(n) 2 Atk. 102.

(o) 3 East. 516.

(p) 11 Ves. 27.

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Helling v. Yeud (a); *Johnson v. Telford* (b); *Doe d. Bunny v. Rout* (c); *Doe d. Hurrell v. Hurrell* (d); as to the effect of the word "property" in the second clause, *Wallam v. Kenworthy* (e); *Gulliver v. Poyntz* (f); and also *dicta* in some of the cases previously cited.

Mr. Smith, Q. C., replied, and cited the following cases, and *dicta* in cases already cited, in addition to those relied on by Mr. Collins.—If the Court decide that the devisee did not take the fee under the first clause, it must decide that she took an express estate for life under that clause, according to the judgment in the case of *Tomlinson v. Dighton* (g), which has been relied on. As to the effect of the word "property," *Doe v. Morgan* (h); *Roe v. Pattison* (i); *Patton v. Randall* (k); *Doe v. Evans* (l); *Church v. Mundy* (m); *Mostyn v. Champneys* (n); *Doe v. Fossick* (o); *Doe d. Pell v. Jeyes* (p); *Ridout v. Pain* (q); as to the fee passing as residue against heir-at-law, *Doe v. Scott* (r); as to power and estate in fee in same person, *Peacock v. Monk* (s); *Doe v. Jones* (t).

CERTIFICATE.

This case has been argued before us by counsel. We have considered it, and are of opinion—

First—That under the clause of the will of Charles Frederick Abbott, which terminates with the words, "direct and appoint the same," Mary Anne Abbott, the devisee, took in the freehold premises thereby devised to her an estate for her life only, with the power of appointment by any deed or will duly executed and attested, supposing such estate or interest to be legal, and not equitable.

Secondly—That under the clause of the said will commencing with the words, "And I give, devise, and bequeath unto my said dear wife," the said Mary Anne Abbott took an estate in fee-simple in said freehold premises, contingent upon her not executing the power of appointment given to her by the said will, and supposing such estate to be legal, and not equitable.

CHARLES BUSHE.

CHARLES BURTON.

P. C. CRAMPTON.

L. PERRIN.

January 17th, 1840.

(a) 2 New R. 214.

(c) 7 Taunt. 79.

(e) 9 Ves. 137.

(g) 1 P. Wins. 149.

(i) 16 East, 221.

(l) 1 P. & Dav. 472.

(n) 1 Bing. N. C. 341.

(p) 1 B. & Ad. 593.

(r) 3 M. & Sel. 300.

(b) 1 Russ. & M. 244.

(d) 5 B. & Al. 18.

(f) 3 Wils. 141.

(h) 6 B. & C. 512.

(k) 1 Jac. & W. 189.

(m) 12 Ves. 426.

(o) 1 B. & Ad. 189.

(q) 3 Atk. 493.

(s) 2 Ves. Sen. 190.

(t) 10 B. & C. 459.

*Monday, November 11th.*WRIT OF RESTITUTION—HOW RIGHT TO, WAIVED
BY NEW AGREEMENT.

Lessee of WYNNE v. SWIFT.

A CONDITIONAL rule had been obtained on a former day, on the part of John and James Keegan, Patrick Quinn, John Gilhooley, Martin Cullen, Michael M'Garaghan, and William Owens, for a writ of restitution, to restore them to the possession of the lands of Tullynacross, in the county of Leitrim. It appeared from the affidavits on which the conditional rule was obtained, that an ejectment on the title was brought to recover the lands of Righmore, otherwise Tullynawanna, heretofore in the possession of certain persons, not being any of the applicants; that there was judgment for the plaintiff, and an *habere* executed, under which the applicants, who were the under-tenants of one of the persons named in the ejectment of the lands of Tullynacross, were turned out of possession. The case had been tried by a view jury, and the applicants swore that they had been dispossessed of their holdings, that they formed no part of the lands mentioned in the ejectment, and that they were not pointed out by mearsmen to the jury as part of the lands for which the ejectment was brought, and also, that they were not served with the ejectments. The answering affidavits denied, as to four of these persons, that they were dispossessed of their holdings under the *habere*, they or either of them not having then occupied any of the lands of Tullynawanna; and as to the other three, that they had, since they were dispossessed, entered into new agreements with the landlord.

Messrs. *Miller*, Q. C., and *Wynne* now shewed cause, and relied on facts in answering affidavits, as conclusive against making the rule absolute.

Messrs. *Armstrong* and *Baker*, on the other side, contended that the facts stated proved a gross abuse of the process of Court, and submitted that the Court would lend itself to that abuse, if it listened to the agreement which was stated in the answering affidavits. It is settled law, that even an under-tenant cannot be dispossessed, unless he has been served with the ejectment.

Per Curiam.

As to one class of the applicants, they have concluded themselves from obtaining relief, by accepting new agreements from the landlord; and as to the others, they have not sworn that they ever were in possession of any portion of these lands, while there is a positive affidavit in reply that they never were. We must, on these grounds, allow the cause shewn.

Rule discharged.

Where seven persons applied for a writ of restitution, upon the ground that they were dispossessed of their holdings under an *habere*, and swore that their holdings formed no part of the premises in the ejectment, and were not pointed out, as part of the premises sought to be recovered, to the view jury who tried the case, and it was answered, that as to four of the tenants, they had accepted new agreements since they were dispossessed, and that the other three were not dispossessed, for they did not then occupy any part of the premises, the Court refused the writ.

Monday, November 16th.

MONEY—PAYMENT OUT OF COURT—POWER OF ATTORNEY.

DESMOND v. DESMOND.

Where a sum of money is lodged in Court by a sheriff until the conflicting claims of two parties are decided, the party found entitled may, when inconvenient to himself to attend, obtain an order for his attorney, duly authorised, to accept the transfer.

In this case, it appeared that after the sheriff had executed an execution, it became necessary for him to lodge the proceeds of it in Court, until the conflicting claims of two parties were decided.

Mr. Collins, Q. C., now applied on behalf of the successful claimant, for an order to draw the money out of Court; and as the party on whose behalf he moved resided in Cork, it would be inconvenient if he should be required to accept the transfer personally. Upon these grounds, he applied to the Court to frame the order in such a manner as to allow the party, or his attorney duly authorised, to accept the transfer, which

The Court, after some consideration, allowed.

Motion granted.

Wednesday, November 18th.

PRACTICE—WHERE AFFIDAVITS NEED NOT BE PUBLICLY STATED.

ANONYMOUS.

Where a conditional order was sought for a *habeas corpus* to remove children from the custody of one of the parents, and the circumstances which created the necessity for the writ were domestic differences, which, it was stated, it would be distressing to all parties concerned to have made public, the Court directed the affidavits to be handed in, for their perusal, and did not require that they should be stated at the bar.

MR. BALL stated that he had an application for a conditional order for a *habeas corpus*, to bring three children from the custody of one parent, in order to have them restored to the care of the other, and stated that if the case could be heard in Chamber, it would in all probability lead to a happy termination of the differences which existed between the parties, without having the matter made public, which would be very distressing to all concerned.

Per Curiam.—You may hand in the affidavits, and if, on perusing them, we think they make out a case for a conditional order, we will grant it.

Friday, November 20th.

PRACTICE—SUBSTITUTION OF SERVICE.

ANONYMOUS.

MR. P. M. MURPHY moved that the service already had in this case might be deemed good service upon the defendant, who was resident out of the jurisdiction. It appeared that some time before, a *capias ad respondendum* was forwarded by the plaintiff's attorney to the land-agent of the defendant, and that he was requested to forward the same to the defendant, who, it was supposed, was out of the country; that subsequently a notice was served upon the plaintiff's attorney, by a Mr. O'Shaughnessy, cautioning him from proceeding further in the cause, as the defendant was in the country, and at large when the writ was forwarded to his agent; and there was the following addition to the signature of this notice: "Attorney for the said defendant."

The COURT granted the order, upon the grounds that the party must be taken to have full notice of the writ, the person who served the cautionary notice having served it as the attorney of the defendant; but further ordered that copies of the *capias*, and of this order, should be served upon the agent and upon Mr. O'Shaughnessy.

Motion granted.

torney for the defendant," the Court allowed the service to be deemed good service.

A writ [of *ca. ad resp.* was forwarded to defendant's land agent, with a request to forward same to the defendant, whom it was supposed was out of the country. Subsequently, a notice was served upon plaintiff's attorney by O'S. cautioning him from proceeding further in the cause, as the defendant was in the country, and at large, when the writ was forwarded to his agent, and signed the notice as "At-

Friday, November 20th.

PRACTICE—SUBSTITUTION OF SERVICE—PARTNERS—SUFFICIENCY OF AFFIDAVIT.

M'KENNY v. WM. R. MARK and JOHN MARK.

MR. PILKINGTON applied for liberty to substitute service of the *capias ad respondendum* issued at the suit of the plaintiff in this case, against William R. Mark on John Mark, for service on the said W. R. Mark, who, it appeared, resided out of the jurisdiction for some time before the issuing of the writ, upon the ground that the defendants were partners in trade.

In order to substitute service of process upon a partner resident out of the jurisdiction, by serving a partner within it, it is necessary that the affidavit

should state that the cause of action is a partnership demand.

The following statement was held to be sufficient: "The action is brought against the defendants, as partners in trade, for goods sold and delivered."

1839.

M'KENNY
v.
MARK.

BURTON, J.—Does your affidavit state that the debt is a partnership demand?

Mr. *Pilkington*.—There is an averment to that effect in the affidavit, in the following words:—"The action is brought against the defendants, as partners in trade, for goods sold and delivered," which was decided to be a sufficient compliance with the rule, in a recent case in the Court of Exchequer.

Per Curiam.—Take a conditional order.

Motion granted.*

* See *Fairlie v. Quin*, 1 Smythe, 189, where a similar application was refused by the Court of Common Pleas in the previous Trinity Term.

—◆—
Wednesday, November 20th.

PRACTICE—UNDERTAKING TO APPEAR—ARREST—
PARLIAMENTARY APPEARANCE.

RADFORD v. BUSTARD.

Where a defendant was arrested under a marked writ, and gave an undertaking to appear on the first day of the ensuing Term, or in default thereof, that judgment might be marked against him. . . The defendant not having appeared, the Court granted an order *nisi* to the plaintiff for liberty to enter a parliamentary appearance for the defendant.

MR. CULLIGAN applied in this case upon an affidavit, which stated that the defendant was arrested on the 8th of August, under a writ marked for the sum of £300; and that having then given an undertaking that he would appear on the first day of the ensuing Term, or in default thereof, that the plaintiff might mark judgment against him, was discharged. The defendant having failed to do so, Counsel applied for liberty to enter a parliamentary appearance for the said defendant.

The COURT made the following order:—

Let said defendant appear by his attorney in four days after service of this order upon said defendant, pursuant to his undertaking in plaintiff's said affidavit mentioned, or in default thereof, let plaintiff be at liberty to appoint an attorney to appear for said defendant, and to enter such appearance in said attorney's name.

Thursday, November 21st.

PRACTICE—VENUE—PRIVILEGE OF ATTORNIES.

MONTGOMERY v. CHEYNE.

MR. HOLMES applied, on behalf of the defendant in this case, to change the venue from the city of Dublin to the county of Antrim, upon an affidavit in the usual terms, that the cause of action arose there, and not elsewhere; and also, that all the witnesses resided in the town of Belfast, so that, in point of convenience, it was most desirable that the action should be tried there, and the action is transitory.

In transitory actions, an attorney has the privilege of suing in his own Court, and laying and retaining the venue in the county in which it is situated.

Mr. Allen, *contra*.—The plaintiff in this case sues as attorney, and is therefore privileged to sue in his own Court, and lay and retain the venue where that Court is situated. It is so laid down in all the English books of practice, 1 *Arch. Pr. by Chitty*, 31, and the same principle was acted on in *Rutledge v. Donovan*, in the Exchequer, on the 15th June, 1835.

Per Curiam.—This is a matter of privilege, and the plaintiff is entitled to retain the venue. Motion refused.

Saturday, November 23d.

PRACTICE—REVIVAL OF JUDGMENT—SERVICE ON HEIR OUT OF JURISDICTION.

BOND v. BOND.

MR. JOHN JENNINGS applied for liberty to issue a writ of *scire facias* to revive a judgment against the heir and terre-tenants of the conusor, and to substitute service upon the heir, who was a minor, and out of the jurisdiction, by serving Richard Winsley Bond, the guardian of the fortune of the minor. The minor had been residing for many years in England, and was then at Chester, with his mother, who was the guardian of his person. R. W. Bond resides here, and upon him substitution of service was sought.

Where it was sought to revive a judgment against the heir and terre-tenants of the conusor, and the heir was resident in England, service upon him was substituted, by serving the guardian of his fortune, who resided in this country, and the guardian of his person, with whom he resided in England.

BURTON, J.—Has not the parol a right to demur?

dian of his person, with whom he resided in England.

1840.

BOND
v.
BOND.

Mr. *Jennings*.—It has been taken away by statute, 1 *W.* 4, c. 47, s. 10.

Per Curiam.

Let the service of the said writ of *scire facias*, together with a copy of this order, upon the mother of the minor, and upon Mr. Bond, the guardian of his fortune, be deemed good service of said writ upon the heir, unless cause shewn the first day of next Term, serving copies of the writ, and of this order, upon these parties six days before.

Motion granted.

. Saturday, 23d November.

AWARD—PRACTICE—MAKING IT A RULE OF COURT—
SUBMISSION MUST BE IN WRITING.

GOULDING v. GOULDING.

That the submission to refer is not in writing, is good cause against making an award a rule of Court; and it lies upon the party applying for that purpose to shew it was in writing.

Either party may revoke his submission before it is made a rule of Court. *Semble.*

MR. MALEY shewed cause against a conditional order which had been obtained on a former day in this case being made absolute. The conditional order was, that an award should be made a rule of Court. He stated three objections; first, that the submission was by parol and ought to be in writing,* ——— v. *Mills* (a). Secondly, the submission was revoked before the conditional order was obtained, which, it is laid down by BUSHE, C. J., in a case in this Court, either party may do before the submission is made a rule of Court, *O'Keefe v. O'Connell* (b); and for

(a) 17 Ves. 419.

(b) 1 Fox & Sm. 68.

* 10 *W.* 3, c. 14, s. 1, after reciting that references by rule of Court had contributed much to the ease of the subject in determining controversies, for rendering awards more effectual, enacts, that it may be lawful for all merchants, &c. desiring to end by arbitration any controversy, &c., for which there is no other remedy but by personal action or suit in equity, to agree that their submission should be made a rule of any of his Majesty's Courts of Record, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they

oblige themselves respectively to submit; which agreement, on reading an affidavit thereof by one of the witnesses, shall be entered of record, and a rule made that the parties be finally concluded. Party disobeying subject to penalties for a contempt; and process to issue on motion, and not stopped unless oath made of misbehaviour of arbitrators and undue means.

Section 2 enacts, that arbitration by corruption or undue means void, and set aside in law or equity, complaint being made before last day of next Term after arbitration.

that position the Court relied upon the case of *The King v. Joseph (a)*. Thirdly, where there is contradictory swearing in relation to an award, the Court will leave the party to his action upon the award, *Hales v. Taylor (b)*.*

1839.
GOULDING
v.
GOULDING.

Messrs. *John Brooke, Q. C., and Graves, contra.*—There is not one word in the affidavit as to this being a parol submission.—[BURTON, J. You must shew it was in writing; it is for you to do so.]—The submission here is sufficient to satisfy the words of the statute; it does not expressly require that the agreement should be in writing; and even if that be necessary, it is not necessary that it should be signed; and in this case the submission was in writing, it being an order of Court in a cause.

THE COURT thought the first objection must prevail, and ruled accordingly.

Rule discharged.

(a) 5 Tann. 454.

(b) 2 Str. 695.

* The first objection was the only one discussed.

Saturday, 23d November.

PRACTICE—LODGING MONEY IN COURT—SATISFACTION OF JUDGMENTS.

QUIN v. EASTWOOD.

MR. LLOYD, on behalf of the defendant, applied for liberty to lodge in Court £715, being the amount due to the plaintiff on foot of two judgments obtained against the defendant in the years 1816 and 1836, and that the plaintiff might be ordered to execute warrants of attorney to satisfy said judgments.

CRAMPTON, J.—You require of us to go into an account and ascertain what sum is due upon foot of these judgments.

Mr. *Barlow, amicus curia*, said he remembered a case, *Chittick v.*

same; it appeared that there was a difference as to the time to which the defendant was bound to pay interest upon them, and also that the defendant was guilty of *laches* in not making an earlier application, the Court refused the motion.

The defendant applied for liberty to lodge the sum which he alleged was due by him to the plaintiff on foot of two judgments recovered against him, and for an order upon the plaintiff to execute warrants of attorney to satisfy

1832.

 QUIN
 v.
 EASTWOOD.

Balfour,* where the plaintiff refused to accept the full sum due upon certain judgments, unless he was paid in British currency, and the Court afforded the relief to the defendant which is sought in this case.

PERRIN, J.—What is the reason the plaintiff assigns for refusing payment?

Mr. *Lloyd*.—He was willing in March 1836 to receive it, if he were paid interest up to the day of payment, but as we tendered payment on the 24th of January up to that day, which was refused, we conceive

* The following is an accurate note of that case : —

COMMON PLEAS.

HILARY TERM, 31st JAN. 1833.

Chittick v. Balfour, and another cause.

This was an application on behalf of the defendant, that he might be at liberty to lodge with the prothonotary, to the credit of these causes, the sum of £2604. 18s. being the full amount of principal, interest, and costs, due to the plaintiff on foot of two judgments obtained by him in these causes, against the defendant, up to the 7th December then last; and that upon such lodgment being made the plaintiff shall execute warrants of attorney to the defendant's solicitor, or to some other person, to authorise satisfaction to be entered on the record. It appeared that the first of the judgments was obtained by the plaintiff against the defendant in Trinity Term 1811, and the second was obtained in Hilary Term 1818: that the defendant in the beginning of 1832 communicated to the plaintiff that the money due on foot of the judgment would be paid off; that in the summer of the same year the defendant waited upon the plaintiff relative to the sum due on foot of them, when the plaintiff said that by the assimilation of currency act, he had been deprived of one-thirteenth of his money, and that he would not receive less than as many pounds as he had

paid in the late currency; that having made other efforts to induce the plaintiff to accept of the sum due upon the judgments, he caused the sum of £3175. 10s. being the amount due upon the above two judgments, and also upon a judgment between the same parties in the Court of King's Bench, to be tendered to the plaintiff on the 7th of December 1832, which tender was verified by affidavit. There were also letters from the defendant declining to accept this sum until he went to Dublin, which he promised on two or three occasions to do for the purpose of having the matter settled on consulting with his lawyers, but which he failed to do.

Mr. *Holmes* applied upon these affidavits, and the Court made a conditional order in the terms of the defendant's application as stated above; cause to be shewn in four days afterwards to a Judge in Chamber.

A similar application was made on the same day in the Court of King's Bench, upon the judgment obtained by the plaintiff against the defendant, and which was of Easter Term 1827 for £500, and an order made in the same terms, with the exception that that Court allowed until the first day of the following Term for shewing cause against the rule.

the plaintiff is not entitled to any interest which has accrued since. In *Peyton v. Lambert* in the Common Pleas, a judgment had been obtained for a sum to be paid by instalments, and when the first instalment became due the party to be paid could not be found, and the other party applied to the Court for liberty to lodge the instalments in Court, which was allowed.—[FERRIN, J. Did you give notice of this application?—Yes, to the attorney on record, who is the plaintiff's son. An order to stay proceedings on foot of the judgment until further order might answer all the purposes.—[CRAMPTON, J. They cannot revive against you without giving you notice.]—They may revive upon *sile* without giving notice when the judgment is not seven years old.

1839.

 QUIN
 v.
 EASTWOOD.

BUSH, C. J.—We must refuse this application. In March 1838 you had all the merits you now have, and you postpone your application from that time until the last day of this Term.

CRAMPTON, J., said he did not wish to hold out any encouragement for such a motion.

FERRIN, J.—In the next Term such an application may be made, but in the mean time the Court is unwilling to tie up a party by a conditional order.
 No rule.

Monday, November 25th.

PRACTICE—JUDGMENT AS IN CASE OF NON-SUIT— WITHDRAWING RECORD.

ANONYMOUS.

In this case a conditional order had been obtained on a former day for judgment as in case of non-suit, upon the pleadings in the cause, shewing that the cause was at issue for more than three Terms, and no trial had taken place. An affidavit had been filed as cause against this rule, which stated that the record had been brought down for trial at the previous Assizes for the county of ——— but that a compromise between the parties having been entered upon, the record was withdrawn in order to allow the matter to be amicably arranged. Two affidavits were filed in reply, negativing any assent to the withdrawing of the

Where a record is brought down to trial and withdrawn with the assent of the defendant, he cannot have judgment as in case of non-suit.

The meaning of the rule as to bringing down the re-

cord is, not merely bringing it down and entering it, but proceeding to trial unless the cause be made a *remanset*.

Where a party seeks to use affidavits somewhat irregularly, and it is apparent that if he applied to the Court he would obtain leave to use them, the Court will allow the affidavits to be used, without putting the party to the expense of a motion for that purpose.

1839.

ANON.

record on the part of the defendant, and stating that it was the plaintiff's act alone; but admitting the allegation as to the treaty between the parties for a settlement of the case out of Court.

Mr. *Baker* now shewed cause. The settled rule upon this subject is this, that where the plaintiff once brings down the record to be tried, the defendant cannot have judgment as in case of non-suit; but his course is to bring the cause down by *proviso*.—[PERRIN, J. The meaning of the rule is not merely that the plaintiff brings down the record, and enters it, but that he proceeds to trial unless the cause be made a *remanet*; it is otherwise where the plaintiff after bringing down the record voluntarily withdraws it.]—The compromise which was set on foot alone prevented us from proceeding to trial; it cannot be considered the voluntary act of the defendant. Our affidavit although it does not in terms state that he assented, yet it is manifest that it was in consequence of the compromise which was set on foot that we withdrew the record, and the affidavits which go to negative that cannot be used upon this motion.

Mr. *Armstrong* on the other side, contended that he had a perfect right to use these affidavits.

BURTON, J., thought he had a right to use them; the order having been obtained upon the pleadings, they cannot be considered as supplemental.

CRAMPTON, J.—Why did you not file these affidavits before you obtained your conditional order? You obtained that order upon insufficient documents; the proper course for you would have been to have brought the fact before the Court, that the record had been brought down for trial and was withdrawn by the plaintiff.

PERRIN, J.—If Mr. *Armstrong* came here for leave to use these affidavits he would obtain it; and if so I would be unwilling to lay down a rule that would create unnecessary expense to parties.

Mr. *Armstrong* was then allowed to use the affidavits which negatived an assent on the part of the defendant to the withdrawing of the record.

Per Curiam.

The question entirely turns upon this, whether the fact of withdrawing the record was by consent of both parties or not, as that would be an answer to a motion for judgment as in a case of non-suit, and the presumption from the contradictory statements in the affidavits is, that

it was not by consent ; but there is also enough on the face of the affidavits to shew that the defendant did not intend to treat the withdrawing of the record as a default by the plaintiff. We will, therefore, allow the cause shewn, but without costs.

Rule discharged without costs.

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ANON.

Monday, November 25th.

PRACTICE—FILING AFFIDAVITS—NOTICE OF MOTION.

ANONYMOUS.

MR. FITZGERALD having applied to the Court upon a notice of Friday the 22d, Mr. *Thompson* objected that although the notice was served, and copies of the affidavits served upon them on that day, the affidavits were not filed until the following day.

Per Curiam.

This motion is irregular; no notice of motion ought to be served until the affidavits (if any) upon which the motion is grounded are filed; it is a great mistake to suppose that serving copies of affidavits in time dispenses with filing them in time. There is no such rule.

No rule.

A motion brought on upon a notice served before the affidavits were filed on which it was grounded is irregular, and will not be entertained, although copies of the affidavits be served at the same time with the notice.

Monday, November 25th.

PRACTICE—BAIL—SETTING ASIDE BAIL-PIECE.

ANONYMOUS.

MR. ANDREWS applied to have the bail-piece in this case taken off the file or set aside upon two grounds; first, that the names of the bail in it were different from those in the defendant's order and notice of bail; secondly, that although the bail-piece appeared to be acknowledged before a Commissioner, it was not stated where it was taken.

Informality in bail-piece.

Per Curiam.—Be it so.

Motion granted.

Saturday, November 16th.

PRACTICE—COSTS—ABORTIVE TRIALS—SPECIAL JURIES—
CERTIFICATE OF JUDGE—EXPENSES OF WITNESSES.

ATKINSON v. CARTY.

Where there had been three abortive trials, a juror being withdrawn by consent on the first occasion, the jury discharged by the Judge on two subsequent occasions, not being able to agree, and a verdict was had for the plaintiff at the fourth trial, and it appeared from the affidavit on the part of the defendant that additional witnesses were examined at each successive trial since the first on the part of the plaintiff, but the plaintiff's attorney swore that the evidence upon each occasion was substantially the same; *Held*, that the plaintiff was entitled to the costs of the three abortive trials.

Where a cause had been tried by a special jury who disagreed, and it was again tried by another special jury, and a verdict given for the plaintiff, and the Judge who tried the case on the last occasion certified that the case was a proper one for a special jury; *Held*, that the party ultimately succeeding was entitled to the costs of the special jury who tried the case on the previous occasion. A party will not be allowed lump sums for the expenses of witnesses; he must specify the items of expenditure.

THIS was an application on the part of the defendant which stood over from Chamber, that the Taxing Officer should be directed to disallow the costs of three former trials which he had allowed, and also the costs of striking a special jury, although the Judge who tried the case did not certify that it was a proper case for a special jury. As to the first question it appeared from the affidavit of the attorney for the defendant that at the Spring Assizes of 1836, for the town of Drogheda, the case came on for trial and the jury not having agreed to a verdict, a juror was withdrawn by consent; that a suggestion was afterwards entered upon the record to change the venue to the county of Louth, and that it was tried there in the Summer Assizes of 1836, and that there were additional witnesses produced (naming them), that the jury upon this occasion did not agree, and that they were discharged by the judge; that at the Spring Assizes 1837 the case was again tried, the plaintiff having previously obtained an order for a special jury, and that upon that occasion also additional witnesses were produced, and the jury disagreed and were again discharged by the Judge; that the venue was afterwards changed to the county of Dublin, and the cause came on for trial at the Sittings after Trinity Term 1837, before a special jury, and evidence differing from that given on the three former trials was given, and a verdict for £100 damages was awarded. The affidavit of the plaintiff's attorney admitted the statements in the former affidavit as to the several trials, but added, that upon each trial the jury were directed in point of law to find for the plaintiff; that upon the first trial they offered to give a verdict for the plaintiff if taken without costs, which was refused as illegal: that the jury was upon each occasion discharged with the assent of the counsel on both sides; that plaintiff's evidence was always substantially the same; and that even if the disputed costs and damages were paid, the plaintiff would be out of pocket. The Taxing Officer allowed the costs in this case, upon the ground that it had been the invariable practice in the office to allow them, and upon the same ground also he allowed the costs of the special jury. The facts with respect to the special jury were these, that one of

the abortive trials had been tried by a special jury, and the Judge who tried the case did not certify that it was a proper case for a special jury, but the Judge who tried the case finally did certify.

There was a cross motion for the expenses of witnesses, which the Officer disallowed, the charges having been in bulk sums, and there not being any specification of the items of expenditure.

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The Attorney General.—Where a cause is made a *remand* was for a long time the only case in which the costs incurred in going down to the previous trial were allowed to the party ultimately succeeding; and so admitted in *Burchall v. Bellamy* (a), where the Court extended the rule to “other similar cases,” that is, to cases falling within the same reason as cases of *remands*. But the present case falls altogether within a different principle, and if it is to be decided upon the printed authorities, upon the practice in England or upon principle, the costs of the three abortive trials in this case ought not to be allowed. The principle of the case of *The Worcesterhire and Staffordshire Canal Company v. The Trent and Mersey Navigation Company* (b), applies to the present case; the former trials being there abortive, the jury having returned nugatory verdicts: and Gibbs, C. J., says that such a case is not within the rule which entitles a party ultimately succeeding to the costs of previous trials. It is also the settled practice in England where the rule awarding a *venire de novo* is silent as to costs, not to allow them, although the same party be again successful, *Bird v. Appleton* (c); the case of *Seely v. Powers* (d), cannot be distinguished from the present and must rule it if it be law; that was the case of a jury disagreeing and being discharged by the Judge, like the present, and although in this case there is some variance between the statements in the affidavits as to whether the jury were discharged by agreement or not, Patteson, J., in his judgment says, he cannot see any difference in reason between withdrawing a juror by agreement, and the discharge of the jury by the Judge. In either case it is done because the jury cannot agree, and he refused the costs of the former trial. The same principle is established in *Waite v. Spurgin* (e), and *Thomas v. Lewis* (f), which was the case of a cause having gone off by reference to arbitrators, and no award having been made, the plaintiff brought the case again and succeeded; and Colridge, J., refused the costs of the previous attempt to try, upon the authority of *Seely v. Powers*.

Messrs. Whiteside and Napier, contra.—It has been stated by Mr. Clancy, that it has hitherto been the invariable practice, in every Court in the hall,

(a) 5 Burr. 2693.

(b) 2 Marsh. 475.

(c) 1 East, 111.

(d) 3 Dowl. P. C. 372, S. C. Harr. & Wall. 118.

(e) 4 Dowl. P. C. 575.

(f) 5 Dowl. P. C. 395.

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to allow the costs of former abortive trials to the party ultimately unsuccessful. The defendant relies upon *Seely v. Powers*—but supposing that case to have been properly decided and reported, this case cannot be governed by it: first, because it does not fall within the reason of it; and secondly, because the uniform practice in this Court is opposed to that decision. *Seely v. Powers* did not decide the general proposition it is alleged to have decided. Patteson, J., puts the case upon the analogy of cases of new trials, new *venires*, and withdrawing a juror by consent. In cases of new trials, he says costs do not follow, because the Court is dissatisfied with the first verdict; and where a juror is withdrawn, that is by agreement, and the rule being silent as to costs, none follow. Here he says *non constat* which way the jury would have found, but the same observations might be made as to a *remanet* case. He distinguishes the case of *Harrison v. Bennett* (a), upon the ground that there, there was a verdict for the plaintiff on the first trial, though it could not be formally received. In that case the jury, having retired to consider their verdict, found for the plaintiff, with no damages. They were directed to reconsider their verdict, and one absconded. The defendant proposed to take the verdict of the eleven, which the plaintiff refused. On the second trial there was a verdict for the plaintiff; and on taxation, the Master allowed the plaintiff the costs of the two trials. On motion to review, it was argued that the defendant, being willing to take the verdict of the eleven jurors, was not in fault; but Lyndhurst, C. B., said, “the plaintiff was not bound to take the finding of eleven jurors; and “as the finding of the second jury shews that the defendant, by resisting “the demand of the plaintiff, was the cause of the litigation, he must “be answerable for the consequences, and pay the costs of the first trial.” “The same principle was laid down in the case of *Scott v. Chetwood* (b), where Smith, B., said, “The principle in all these cases is, that the “party defeated is liable to all the costs that may incidentally occur: the “the plaintiff on account of his unjust demand, the defendant on account “of his unjust resistance.” The ground of the distinction applied by Patteson, J., to *Harrison v. Bennett*, applies to the present case, for the plaintiff had, in fact, an informal verdict, and he was always, as a matter of law, entitled to a verdict which would have carried costs. The case of *Seely v. Powers* is based on established practice. In this country, the practice has always been, to allow the costs when a juror is withdrawn. That was established in this Court in the case of *Baker v. Mallett*,* and in the Court of Exchequer in the case of *Leisec*

(a) 1 Cr. & M. 203.

(b) 1 R. L. & S. 505.

*KING'S BENCH.
 EASTER TERM, 1835.
Baker v. Mallett.
 This case came before the Court,

on motion to review the Officer's taxation. It appeared that the case had been twice tried, first in 1833, by *Jebb, J.*, and a special jury. The

of *Lee v. Byrne*,* and this is mere matter of practice *Standen v. Hall* (a); and even if the Court thought the practice wrong, it would only change it prospectively, *Burchall v. Bellamy*, *Sparrow v. Turner* (b); and from the observation of Alderson, B., in *Wainwright v. Bland* (c), in which the principle we are contending for was admitted, it would appear that the reporter of *Seely v. Powers* misapprehended that case. The cases of *Sadler v. Evans* (d), *Cuthbert v. Birt*, cited in that case (e), and *Executors of Sir T. Lighton v. Brett* (f), were also relied on. As to the costs of the special jury, they were allowed in *Baker v. Mallett*, upon a certificate after the trial, that is, *after verdict*, which we have obtained in the present case.

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Mr. M'Donnell, Q. C., replied, and contended that it must be presumed, where a party fails in obtaining a verdict on a former trial, that there has been some default on his part in obtaining sufficient evidence or witnesses, or in the management of the cause, otherwise that he would have succeeded, as he did eventually. In the present case, it was admitted, that different and additional evidence was given on the last trial, from any of the preceding, and the verdict of the jury may have been founded on such additional evidence. On what principle

(a) 1 Kenyon R. 338.

(b) 2 Wils. 366.

(c) 2 C. M. & R. 740.

(d) 4 Burr. 1987.

(e) 4 Burr. 1988.

(f) 4 Law Rec. O. S. 277.

jury did not then agree, and a juror was withdrawn by consent. It was stated in the affidavit in that case, as in the present, that the plaintiff brought forward additional evidence on the second trial, and produced witnesses whom he might have examined on the former trial, and that defendant's consent was, on the grounds that it would save the costs of the first. There was a verdict for the plaintiff on the second trial, and the Officer allowed the costs of both trials. A motion to review his taxation. In Hilary Term the case was argued by Sergeant Curry and Mr. Holmes, for the plaintiff, and Sergeants Jackson and Greene for the defendant; and in the following Easter Term, the Court refused the motion, and approved of the Officer's taxation.

juror was withdrawn, by consent; on the second trial, the lessor of the plaintiff had a verdict. The costs of both trials were allowed; and on motion to review the taxation, Messrs. Hatchell, Q. C., and H. Martley, for the defendant, relied upon *Seely v. Powers* and *Stodhart v. Johnston*, 3 T. R. 657. Mr. Brewster, Q. C., for the plaintiff, relied upon *Burchall v. Bellamy*. He also stated that the practice of the Court of Queen's Bench was, that if a juror be withdrawn, and no further trial, each party bears his own costs; but if a further trial, the party succeeding gets the costs of both, and that that was the uniform practice of the Taxing Officer. The Court said they would not disturb the practice of the Taxing Officer, if it had been uniform, and referred to him to report the practice. This he afterwards did, and the costs were allowed.

*EXCHEQUER—EASTER TERM, 1837.

On first trial, at Wexford, a

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should a party be entitled to the costs of a trial on which he did not succeed? This does not militate against the rule laid down in *Burchall v. Bellamy*, which was merely this, that "in all cases where a cause goes down to trial, and goes off upon any occasion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going down to trial shall be taxed and allowed to the party finally prevailing;" because it cannot properly be said that the cause *went off* here without the *fault* of the plaintiff. Besides, the expression "goes off" means, where there has been no trial, as in that case, where there had been an ineffectual reference, and in other cases of a similar description. The Court will consider this as a question of law, to be decided upon principle, and the authority of reported cases in England, and not upon any practice which may have prevailed in this country. The decision of *Baker v. Mallett*, if it is to be considered an authority, may perhaps be distinguished from the present, upon this ground, that the parties in that case consented to the discharge of the jury; whereas, in this case, it is sworn that there was no consent given as to their discharge on the part of the defendant. What is relied on from *Wainwright v. Bland* was a mere *dictum*. The cases of *Stodhard v. Johnston* and *Seely v. Powers* ought to govern this case. It has been attempted to impugn the authority of *Seely v. Powers*, but in *Waite v. Spurgin*, Patteson, J. said he would abide by his former decision in *Seely v. Powers*; and adds, as to that case, "I took time to consider that case, and examined the authorities on the subject, and the result of my inquiries was, that the ultimately successful party was not entitled to costs attendant upon endeavouring to try the case." With respect to the costs of the previous special jury, the words of the act 3 & 4 W. 4, c. 91, s. 27,\* are imperative, that the judge shall certify *immediately* after the trial, and the practice of the Court cannot affect the construction of this act.

*Monday, November 25th.*

BUSHE, C. J.

The opinion of each of the Taxing Officers is against this application upon both the objections which have been taken to the Officer's taxation. The serious question was, whether the costs of three abortive trials ought to be paid to the plaintiff? The Officer states that the rule upon which he has acted has been long recognized, and perfectly uni-

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\* It is thereby enacted, that the person who shall apply for a special jury shall pay the fees for striking such special jury, and all the expenses attending the trial of cause by same, and shall not have any greater allowance for the same than if case had been tried by a

common jury, unless the Judge before whom the cause is tried, "shall, immediately after the trial, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

form. Several cases have been cited, in different Courts, to establish that, and no case to shew that any other mode of taxation existed in this country at any period. We are therefore of opinion, that the Officer has acted rightly in allowing these costs in the present case. We are also of opinion, that in disallowing the sums charged in a lump for witnesses, he acted correctly.

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PERRIN, J.

The case of *Baker v. Mallett* decides the practice upon the principal point, and that decision, I think, is in accordance with justice. With respect to the costs of the special jury, his Lordship said, that under the 17 & 18 G. 3, c. 45, and the 40 G. 3, c. 72, it might be held, perhaps, that the party applying for the special jury ought to pay the costs of striking it; but the two enactments being now embodied in the 3 & 4 W. 4, c. 91, and the practice being to allow all the costs incident to a special jury, he thought the Court was justified in continuing that practice; and he was also of opinion, that where the Judge certified upon one occasion, that amounted to saying, generally, that the case was a proper one for a special jury.

No rule.\*

\* In *Wood v. Duncan*, it was decided, that where a cause is referred by order of *Nisi Prius*, and the award is afterwards set aside, on the ground of the arbitrator not having adjudicated on all the matters referred, and the cause is tried again, the party ultimately succeeding is not entitled to the costs of the first trial. 5 *Mee. & Wels.* 87. As to the party applying for the special jury paying the costs of it, see *Coghlan v. Carney*, ante, 1 Ir. Law Rep. 201.

Saturday, November 16th, and Saturday, November 23d.

PRACTICE—EXECUTION OF WRIT—LIABILITY OF  
SHERIFF—ADVERSE CLAIMS—LODGING  
MONEY IN COURT.

RAMSDEN v. CONRY.

THIS was an application on behalf of the late sheriffs of the city of Dublin, that the time to file the writ of *fiery facias* in this cause might be extended, and that the said sheriffs might be at liberty to lodge in

Where the sheriffs of the city of D. levied a certain sum under an execution, and

before they paid it over to the plaintiff, received two notices from creditors of the defendant, stating that the defendant was a bankrupt, and cautioning him against paying the said sum to the plaintiff, and it appeared that the sheriffs had delayed the execution of the writ, and the sale of the defendant's goods, and from the circumstances of the case, the Court were of opinion that they did not act *bona fide* in the transaction, a motion on their behalf, to lodge the sum in Court until the adverse claims were decided, was refused, with costs.

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Court, to the credit of the cause, the sum of £116. 16s. 11d., being the amount marked at foot of said writ, and that the plaintiff might be restrained, in the mean time, from entering or making any fine absolute against the sheriffs. Upon the first discussion of the motion, and at the desire of the parties, the Court allowed the motion to stand over until further affidavits should be filed, and that, in the mean time, the sheriffs should lodge the money in Court. On the 23d of November, it was brought on by a cross-notice on the part of the plaintiff for an order upon the Officer to pay over to him the amount ordered to be lodged in Court.

The affidavit of William Maziere, the plaintiff's attorney, stated, that on the 29th of April, the defendant was arrested, upon a marked writ, for the sum of £97. 1s. 5d. On the 4th of May, notice of bail at bar was served, and same discharged on the 6th for default of bail-men; that immediately after such discharge, deponent called at the sheriffs' office, and asked for a return to the writ, when Malone, Chief Clerk, stated to him, that he had received an excuse from Mr. Lindsay, for not being able to attend to put in bail, one of the proposed bail-men, and saying that he would perfect the usual bond to the sheriffs to be answerable to them for the defendant's appearance at the return of the writ; that the plaintiff was perfectly safe, as the sheriffs were answerable; and that if he called same day at two o'clock, he should either have the money or an assignment of the bail-bond, and Campion, the sub-sheriff, said he should not be disappointed; that having called at the appointed time, and being again requested to call a third time, having done so, he was informed that Lindsay refused to perfect the bond, and that notice of fresh bail would forthwith be served; upon which he threatened to proceed against the sheriffs, alleging that they had been trifling with him, and they said he might take his own course, as the sheriffs were indemnified; that he saw the defendant that day walking in the yard of the Four Courts, the return of the writ having expired; that immediately after he entered the rule on the sheriff to return the writ, which rule could not be made absolute until the 23d of May, on which day, upon going down to make same absolute, he found the writ filed on the 22d of May, with a return thereon that they had the body; and in the course of the same day he met the defendant at large upon the quays, and having made inquiries at the sheriffs' prison, he was informed that the defendant was not there, and had not been confined there for three weeks before. On the 27th of May, fresh bail was perfected, and upon the 5th of July, a plea of confession for the full sum given, with stay of execution until the 1st of September; that judgment was marked upon the 5th September, and on the 11th September, a writ of *feri facias* issued, returnable the 2nd of November, to the sheriffs of the city of Dublin, marked for the sum of £116. 6s. 11d.; that same was delivered at two o'clock the same day, and deponent required the

said Malone forthwith to execute the writ, to which Malone answered, that he would seize that day; that in two or three days Malone informed him he had seized sufficient goods, and if not settled with, he would proceed to sell them; that on the 21st September, Wheeler, a person holding some situation in the sheriffs' office, called to him, and shewed him the original writ, and told him Malone desired him to bring it to deponent, and get him to change it to one against the body, and that he would then have no difficulty in getting the amount, which he refused, but required the sheriffs to execute the writ forthwith; that in the beginning of October he was informed, that since the execution issued, the defendant had removed some of his goods in payment of another creditor, and this fact was corroborated by the affidavit of a person, to whom it was told by the creditor who received the goods from the defendant; and having called same day at the sheriffs' office, and told this to Malone and Campion, the former said he had seized, and would advertise a sale forthwith; that on the 7th November, he went to the sheriffs' office, and asked Malone and Campion for a return of the writ, and they told him they would have the best return for him the following morning, namely, the money, that a sale was then going on, &c.; that upon the 8th, Campion and Malone shewed to him a notice served upon them by one Oldham, cautioning the sheriffs from selling, as the defendant was a bankrupt, but denies that they (as they now alleged) informed him that a similar notice had been served on the 29th of October by Geoghegan; believed the sheriffs were acting in concert with the defendant, to allow him to commit a premeditated act of bankruptcy at his convenience, and, were in collusion with him to delay the plaintiff's proceedings.

The affidavits of Malone and Campion denied all collusion with the defendant, and stated, that the reason for requesting the plaintiff's attorney to change the writ was, that they believed the writ of *feri facias* was issued in mistake; that, being a bail case, he ought to have issued a *ca. sa.*; that on the 24th of May, the plaintiff's attorney issued a writ against the late sheriffs for an alleged false return to the writ of *capias ad respondendum* in his affidavit mentioned, and which suit was then depending; that the day after the delivery of the writ of *feri facias*, they seized the defendant's goods, but they being considerably more than sufficient to pay the plaintiff's demand, and there being no other execution in the office, and being fully persuaded that the amount would be made up and paid to the plaintiff before the return of the writ, they did not consider that they were acting with any impropriety in postponing the sale, in order to give the defendant time to make up the amount; that they so acted in conformity with their previous practice; that he (Campion) was ignorant of the sending of the writ to be changed, and that a second execution having come

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into the office, he caused the defendant's goods to be seized and sold; that it must have been through inadvertance he omitted to state the notice served upon him by Geoghegan on the 29th of October of the defendant's being a bankrupt, and cautioning them from selling the defendant's property, or paying over the proceeds to plaintiff, that the omission was wholly unintentional, and that they were not parties or privy to any concert to delay the plaintiff.

Mr. *Nelson* submitted upon the affidavits, that there was manifest collusion between some of the parties in the sheriffs' office and the defendant, to the prejudice of the plaintiff. They say one day that the bail-bond should be assigned or the money paid, and neither is done; and when the plaintiff's attorney expostulates with them, he is told he may take what course he pleases as the sheriffs are indemnified. Subsequently, having obtained a plea of confession, ten days after a writ of *fi. fa.* had issued thereon, they send to him a suggestion to change the writ, and to proceed against the person of the defendant, and all this time suffering the defendant to dispose of his goods for the payment of other creditors; and after delaying him thus, when they at length sold the defendant's goods they inform the plaintiff's attorney that the defendant had been a bankrupt, and that they could not pay over the proceeds of the sale to the plaintiff. As to the practice in cases of this kind, counsel cited *Tucker v. Morris* (a), *Duddin v. Long* (b), *Ostler v. Bower* (c).

Mr. *Brewster* said, that if the motion on behalf of the sheriffs was refused, it would be deciding that if they exercised the slightest discretion in giving time to a debtor, although they are here according to the exigency of the writ, they may render themselves liable. The sheriff was justified in letting the defendant go at large even after the return of the writ. The material part of the case is this, was there collusion between the parties? and *Malone* and *Campion* both swear that they were not parties or privy to any arrangement to prejudice or delay the plaintiff. The plaintiff has brought an action against the sheriffs, and they should be left to stand or fall by that action.

CRAMPTON, J.—I am disposed to view the question in this way, your motion would be a motion of course if the sheriffs acted fairly towards both parties; but I cannot think they did.

PERRIN, J.—There is a charge in the affidavit of the plaintiff's attorney, that you allowed part of the goods to be taken away.

(a) 1 Dowl. P. C. 639.

(b) 3 Dowl. P. C. 139.

(c) 4 Dowl. P. C. 605.

Mr. *Brewster*.—If the Court is prepared to say that the sheriff is to seize £1000 worth of goods for an execution marked for £90 I must yield.

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CRAMPTON, J.—We are not doing any such thing ; but we are looking through the affidavits in order to see what has been the conduct of the sheriffs ; in addition to the circumstances already adverted to, after having seized the goods, some one acting on behalf of the sheriffs desired that the writ should be changed, the consequence of which would have been a return of *nulla bona* to that writ.

*Per Curiam.*

Upon the whole of this case we are of opinion that it is the duty of sheriffs who seek the assistance or protection of this Court to shew that they have acted *bona fide* in the discharge of their duty ; and in the present case we are not satisfied that they did so, and we must, therefore, refuse their motion with costs.

Motion on behalf of the sheriffs refused with costs.

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[The Court did not make any rule upon the cross-motion on the part of the plaintiff, that the sheriffs should pay over to him the sum ordered to be lodged in Court, the counsel for the plaintiff not pressing that motion.]

# CASES IN THE QUEEN'S BENCH,

*HILARY TERM, 1840.*

*Monday, January 13th.*

## PRACTICE—STAYING PROCEEDINGS ON BAIL-BOND— LACHES OF PLAINTIFF—FORM OF AFFIDAVIT.

SMITH Assignee of NORRIS v. CALLAN.

Where in action against the bail, it appeared that the bail-bond was executed so long ago as the 18th November, 1837; that the bail offered to render the principal on the 21st of November, but subsequently requested the plaintiff to delay proceeding on the bond and the principal had in the mean time become insolvent, a motion to stay the proceedings was refused with costs.

The affidavit on the part of the bail must deny collusion with the original defendant.

MR. HOLMES applied for an order to stay proceedings on the bail-bond in this case. A *capias* had been issued on the 29th September, 1839, declaration filed on the 14th November, against the defendant, and *oyer* of the bond obtained upon the 22d of November. Upon inspection of the bail-bond it appeared that it had been executed by the defendant and one Patrick Carran so long ago as the 18th of November 1837, and was conditioned for the appearance of Thomas Callan on the 20th November; it further appeared that the writ against the principal had never been returned, no declaration filed, or any proceedings ever taken since, and the original debtor was altogether out of Court. The writ against the principal was issued on the 2d of November, 1837, for £66. 5s., and the bail offered to surrender principal on the 21st of November, 1837, and the bail-bond was not assigned until the 26th of January, 1838. Upon the 24th of September, 1838, Thomas Callan filed a petition in the Court for the relief of insolvent debtors, and was discharged upon the 10th of October, 1838; upon that occasion he returned himself in his schedule as indebted to the plaintiff in the sum of £198. 15s.; and that Smith, the plaintiff, was appointed assignee of Norris upon the 3d of August, 1838. It is laid down in every book of Practice, that where the bail are injured by the *laches* of the plaintiff the Court will interfere and relieve them.—[CRAMPTON, J. What injury have you suffered?—We could have rendered him before he became insolvent. It is sworn that we offered to render him in November 1837.

Mr. Napier admitted the principle as stated by Mr. Holmes, that there is no better ground for relieving the bail than that they have

been injured by the *laches* of the plaintiff. The plaintiff is not in fault; he could not compel a return of the writ after he had taken an assignment of the bail-bond, *Lord Brooke v. Stone* (a). As to the case being out of Court, if you take an assignment of the bail-bond within a year after the return-day of the writ it is sufficient, *Carmichael v. Chandler* (b), and you have no longer anything to do with the original action; *Lord Brooke v. Stone*. —[CRAMPTON, J. What do you say to the passage in the affidavit as to the offer to render the principal in 1837?]—It does not affect this question, for it is expressly stated in our affidavit, that after the assignment of the bail-bond, the plaintiff's attorney applied to the defendant, and that he requested him not to proceed, that he would have the matter settled; and that he subsequently made several applications to the defendant to pay the amount of this debt, and at his request delayed to proceed. There is no affidavit in the present case, denying collusion, such as is required on applications of this kind by the rules of the Court.\*

The COURT, after some consideration, refused the motion with costs.  
Motion refused with costs.

(a) 1 Wils. 223.

(b) 3 Dougl. 433.

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\* *Reg. Gen.* Hilary Term 1824. "affidavit of merits (or if made on  
"It is ordered, that from and "the part of the sheriff or bail, or  
"after the last day of this Term "any officer of the sheriff), be  
"no rule shall be drawn up for "grounded on an affidavit shew-  
"setting aside an attachment re- "ing that such application is really  
"gularly obtained against a sheriff "and truly made on the part of the  
"for not bringing in the body, or "sheriff, or bail, or officer of the  
"for staying proceedings regularly "sheriff (as the case may be), at  
"commenced, on the assignment "his or their own expense, and for  
"of any bail-bond, unless the ap- "his and their own indemnity, and  
"plication for such rule shall (if "without collusion with the ori-  
"made on the part of the original "ginal defendant."

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v.  
CALLAN.

*Saturday, January 18th.*

**TRESPASS—WATER-COURSE—PAROL DEMISE—  
VARIANCE.**

**HOUGH v. KENNEDY.**

Where A. declared for disturbance of a water-course, through which he alleged he had a right to have the water of a certain ancient stream flow "at all reasonable times," and it appeared that A. was tenant from year to year to B., who had had a user of this and a certain other water-cut from the same stream, for more than 20 years, using one at one time, and another at another time, as he pleased, and under whom, until B.'s interest was evicted in the year 1825, the plaintiff had been so enjoying the benefit of the stream; and subsequent to the eviction, the plaintiff continued to hold as tenant from year to year to the head landlord, as he had before he held from B. Upon the trial, the defendant, in support of his plea, offered evidence that the plaintiff, after the eviction, had used the water-course in question for the purpose of irrigating his meadows, which lay at a distance from the stream, one of which being the water-course in question, and which some of the witnesses called "Smith's Cut," was made in a westerly and north-westerly direction, and served to irrigate the higher and more westerly lands; the other, parting from the stream a little to the north of the former, and taking a direction not so much to the westward, was used for watering the lower lands. It further appeared that Smith used the two water-courses as he had occasion, in

**TRESPASS.** This was an action on the case for obstructing a water-course; the declaration contained eight counts. The first count stated that the plaintiff was possessed of a certain close, situated near to a certain ancient stream; that the defendant was possessed of a certain other close, nearer to the source of the said stream: that before the committing of the grievances, &c., a portion of said stream did flow, and of right ought to flow, and still of right ought to flow, at all reasonable times of the year, for the irrigation of meadow-land, out of said ancient stream, through a certain cut, commonly called "Smith's Cut," through three several closes, to the close of the plaintiff, for the purpose of supplying the same with water at all reasonable and proper times of the year, but that the said defendant, intending to injure the plaintiff, ploughed up and stopped, &c. the said "Smith's Cut," during all reasonable and proper times, and prevented the flow of water in said cut, whereby, &c. The seven other counts did not vary the statement of the cause in any way to affect the argument. The defendant pleaded the general issue. The case was tried before FOSTER, B., at the previous Summer Assizes for the county of Tipperary. It appeared in evidence, that previous to the year 1804, the whole of the lands of Killineave, of which portions are now occupied by the plaintiff and defendant respectively, were held by a person named Smith from a person named Hare; that a small stream, called the Neave, ran from south to north along the lands of Killineave in Smith's possession, and formed their eastern boundary; that Smith being so in possession of all the lands lying along the river, some time in or previous to the year 1804, made two water-cuts or drains, for the purpose of irrigating his meadows, which lay at a distance from the stream, one of which being the water-course in question, and which some of the witnesses called "Smith's Cut," was made in a westerly and north-westerly direction, and served to irrigate the higher and more westerly lands; the other, parting from the stream a little to the north of the former, and taking a direction not so much to the westward, was used for watering the lower lands. It further appeared that Smith used the two water-courses as he had occasion, in

support of the verdict, and have a non-suit entered, on the ground that the demise of this right should be by deed, and also on the ground of a variance between the right declared on and that proved — *Held*, that the motion should be refused, with costs, the Court being of opinion that the parol demise was sufficient, and that there was no variance.

some years letting the water into one, and in some years into the other, and sometimes into both together, until the year 1825, when Smith's lease was evicted and determined, and he was put out of possession. It further appeared that the plaintiff Hough, for some time previous to the eviction of Smith's lease, had held a small portion of the lands of Killineave, as tenant from year to year to Smith, and that on the eviction of Smith's lease the plaintiff was not dispossessed, but continued in the occupation of his holding, as tenant from year to year to the head-landlord, Mr. Hare. It also appeared that the defendant became tenant to the portion of the lands in his possession sometime about the period of Smith's eviction, and had since continued in possession as tenant to Mr. Hare. It also appeared, that after the eviction of Smith, the water-course called "Smith's Cut" had been used for irrigating the meadow of the plaintiff up to about three years before the time of the trial, when the defendant ploughed up and converted into tillage a pasture field in his occupation, through which the water-course called "Smith's Cut" ran (and which lay nearer than the plaintiff's meadow), and thus stopped up and obstructed that part of the water-course which so ran through the defendant's field. When the plaintiff's case closed, counsel for the defendant called upon the learned Baron to non-suit the plaintiff, on the ground that the evidence did not sustain the right claimed in any of the counts of the declaration, which his Lordship refused to do, but directed the jury, if they believed the evidence, that they ought to consider Kennedy as having found Hough in possession of a certain modified enjoyment of the water, which he, Hough, had possessed for 30 years, and that Kennedy had no right to make any alteration in the *status quo* he found the enjoyment of the water, and that, therefore, they ought to consider Kennedy as a wrong-doer, and find a verdict for the plaintiff; and the learned Baron reserved liberty to the defendant to move to have it set aside, and a non-suit entered, if the Court should be of opinion that he ought to have non-suited the plaintiff.

Mr. *H. Martley*, upon a former day, obtained a rule *nisi* to set aside the verdict, and have a non-suit entered, against which,

Mr. *Hatchell*, Q. C., with whom was Mr. *Brewster*, Q. C., now shewed cause. The plaintiff proved that he had been the under-tenant of Smith, and that he continued in possession of the lands through which this stream passed since Smith was dispossessed; that the defendant was in possession of the higher lands; that this stream ran in that direction for upwards of twenty years, and that it was occasionally opened to irrigate his farm; that he was deprived of the benefit of this stream by the act of the defendant, and, under these circumstances, submitted that the plaintiff was clearly entitled to retain the verdict he obtained.

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*Mr. Henry Martley, contra.*—The declaration states the plaintiff's right to this easement by virtue of his possession of a certain close. It appeared that Hare was the head-landlord; that Smith was evicted in 1825, and that previous to his eviction he used these cuts just as he pleased. No proof was given of their having been used by any other person. There was a new demise after Smith's eviction, and about that time the defendant came into possession; they were both tenants from year to year. It does not lie upon the defendant to shew that he had a right to stop this cut, but the *onus* is upon the plaintiff to shew he had not such right.—[CRAMPTON, J. The question is, what was demised?—There cannot be a *parol* demise of an easement of this kind, either *per se*, or along with a *parol* demise of land, unless it be annexed. *Fentiman v. Smith* (a).—[CRAMPTON, J. Is it not annexed here?—No; the plaintiff claims a right to have a certain thing pass over the land of another to his own, which right cannot pass but by deed, or unless he can shew the right appurtenant.—[CRAMPTON, J. If a man seized in fee of a mill demises from year to year, could he then turn the water away?—The case of *Mechelen v. Wallace* (b) is an authority to shew he might do so. If an agreement is void as to part, it is void as to the whole. Therefore, if there be a demise by *parol* of a thing which lies in grant, together with a grant of a thing which may pass by *parol* demise, it is bad in the whole. *Parol* demises are not favored in law: statutes have been passed to restrain them. But supposing there was evidence of some right in the plaintiff, it was not, as stated in the pleadings, an unqualified right to use the water-course at all reasonable times of every year, but only at such times as Smith might have thought fit. And accordingly, the Judge put it in this way, that the plaintiff had a *modified* enjoyment, which he referred to the thirty years' user in the time of Smith. The enjoyment which he had in Smith's time is not what he has declared on, for he declares for a right, at all times to irrigate his meadow, whereas the evidence was, that Smith only occasionally let the water into the cut, and at such times as he pleased; and that at any other time, the plaintiff had no user or enjoyment of the water. The right in the plaintiff to injure or damnify the defendant by the passing of the water must be proved, and the only evidence given was of Smith's right.—[BURTON, J. The question comes to this, whether there is evidence to sustain any count in the declaration, that is, whether there is a variance? You admit that the plaintiff had a certain modified right; how could a count for that be framed?—I contend that the plaintiff has shewn no right of action against the defendant at all. He has shewn no adverse possession to entitle him by user; he has not given any evidence of a grant, nor was the ques-

(a) 4 East, 107.

(b) 7 A. &amp; El. 49.

tion left to the jury to presume one; and, even if he have a right, he has misstated it.

Mr. *Brewster*, Q. C., replied, and relied upon *Canham v. Fisk* (a).

BURTON, J.

The only question for the Court was, whether there was evidence to go to the jury to sustain any of the counts, and we are of opinion that there was; and they having found a verdict for the plaintiff, we see no cause for disturbing it.

CRAMPTON, J.

I am of the same opinion. It is said, first, that the plaintiff has shewn no right to what he claims: I have no doubt there was a modified right in him, because Smith made a cut through his own farm, and another for the benefit of the land now in the possession of the plaintiff, to irrigate both portions, at the time Smith had dominion over the entire. In 1825, the landlord exercised his right to dispossess Smith, and he might then have made what demise he pleased, and of what he pleased, and he then demised precisely the same as the plaintiff held previously, and, therefore, a demise of the water as well as of the land. As to the position, that water cannot be demised without deed, that may be true; but no case has been cited to shew that it cannot be so demised in conjunction with land. With respect to the second objection, that the right proved is not the right declared upon, because user enjoyed previously was only a user enjoyed occasionally, sometimes one year, and sometimes another year, and the right declared upon was a right of user at all reasonable times, the answer appears to me to be this, that the subsequent enjoyment shews the understanding to have been, that, at all reasonable times, the plaintiff might or might not use the water, just as he pleased; and between this, and a right of user at all times, I see no variance.

PERRIN, J. concurred. Hare demised to the plaintiff land where there was water, and which water was useful for the beneficial holding of his land. That is not an easement, or like the case of *Fentiman v. Smith*, but it is the same as if a man let a house from year to year, through which water was conveyed by a pipe outside. Could he turn that water away? Surely he could not; and the water in the present case passed as completely as window light would pass, which a party could not shut out. It is not an easement, and requires no presumption of a grant, as the case of *Canham v. Fisk* clearly establishes, if an authority

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were wanting. As to the second objection, that the right declared on is a right of user at all reasonable times, I quite agree with Mr. *Martley*, that we ought to see how this water had been used previously; but the evidence is, that Smith used one cut one year, and the other cut another year, not in alternate years, but in every respect just as convenience required; and what right is that, but to use either or both every year, if he so pleased? There is, therefore, no foundation for the objection as to variance.

Cause allowed, with costs.

*Saturday, January 18th.*

EJECTMENT—CONSTRUCTION OF LEASE—SUFFICIENCY  
 OF STAMP—TENANCY FROM YEAR TO YEAR—  
 EVIDENCE.

Lessee of KENNEDY and others, Executors of MATTHEW KENNEDY v.  
 HAYES.

Where in an ejectment on the title by the executors of a co-lessee in a lease for years, it appeared that the granting part of the lease gave separate portions at separate rents to the respective lessees, but the *habendum* and covenants in the lease were joint; and it further ap-

peared that the testator died leaving the co-lessees surviving, and his widow, who subsequently married the defendant; and that the widow and the defendant continued since the death of the testator to pay rent, and sometimes to the executors sometimes to the head landlord, until the time of bringing the ejectment; three objections were taken at the trial, with leave to move to enter a non-suit being reserved. First, that the lease was a separate lease for the three tenants, and could not be received in evidence as it had but one stamp and ought to have three. Second, that by being received in evidence it was established as a joint lease, and the executors had no interest, as the co-lessees took by survivorship, or, if the deed operated as a deed of partition as well as a lease, it required an agreement stamp; and, third, that the payments of rent by the defendant and his wife constituted a tenancy from year to year. On motion to set aside the verdict and enter a non-suit, *Heid*, 1st, that the lease was a joint lease; 2nd, that the lease, required an agreement stamp; 3d, that there was evidence to go to the jury of a tenancy from year to year, and which question ought properly to have been left to them; but as the result would be the same upon a new trial, the Court refused to grant one, and made the rule for the non-suit absolute.

EJECTMENT on the title.—This case was tried before FOSTER, B., at the last Summer Assizes of Nenagh; the declaration was for 27a. Or. 20p. of the lands of Ballincarha; the lessors of the plaintiff were the executors of Matthew Kennedy, and as such sought to recover the land. On behalf of the lessor of the plaintiff, the probate of Matthew Kennedy's will was given in evidence, which shewed that he died in 1821; and a certain lease of the lands in the declaration, and of other lands, made many years since by the late Richard Gason, Esq., who was seized in fee, to Matthew Kennedy and two other persons, for a term of years of which eight or nine were then unexpired; the granting part of the lease, after stating "all that and those," &c., went on to add "that is to say 44 acres of the said lands," &c., "subject to," and stated the number of

acres and the amount of rent separately for each of the three tenants; the *habendum* was, "to hold the said lands, &c., to them, their executors, administrators and assigns;" and the *reddendum*, "they, their executors, administrators and assigns, yielding and paying thereout the yearly rent of," &c., being the annual rent of the entire of the premises. Counsel on behalf of the defendant objected to the reception of this lease in evidence, on the ground that it had only a stamp sufficient for one lease, whereas it was in fact three leases, and should, therefore, have had three stamps, one for the demise to each tenant: the learned Judge refused to non-suit, but took a note of the objection, with liberty upon this ground to move for a non-suit. The lease having been read, counsel next insisted that by receiving it in evidence the learned Judge had in effect decided that it was a joint demise, and if such was its legal operation, the plaintiffs must be non-suited, inasmuch as the interest in the entire demised lands would, on the death of Matthew Kennedy, have survived to his co-lessees, who had outlived him; and counsel further objected that this deed ought to have an agreement stamp; the learned Judge also took a note of these objections, and reserved liberty to move for a non-suit. The plaintiffs then proved that Matthew Kennedy died in 1829 or 1830, that from his death his widow, who had since married the defendant, had continued to occupy in his dwelling-house, and to hold in her exclusive possession, and to cultivate as the owner or tenant, about a moiety of the lands in the declaration, being the premises sought to be recovered; that the lessors of the plaintiff, as the executors of the said Matthew Kennedy, took possession of the other moiety of the land in the declaration, about nine years since, and that the possession of the other moiety was demanded from the defendant before the day of the demise; on cross-examination, the witness who proved the foregoing facts admitted, that since the death of her first husband, the defendant's wife, and since her marriage the defendant himself, had regularly half-yearly paid the proportion of the head-rent to which their moiety of the lands was subject; that these payments were sometimes made to the lessors of the plaintiff, and sometimes to Mr. Gason himself, and that in the latter case the lessors of the plaintiff always took credit from Mr. Gason, for all such payments so made to him by the defendant, or his wife, and only paid the balance of the entire rent. Upon this evidence counsel for the defendant called upon the learned Judge to non-suit the plaintiff, or to direct the jury to find for the defendant, on the ground that those payments of rent by the defendant and his wife established, at least, a tenancy from year to year; this the learned Baron declined to do, but reserved a similar liberty as before to move to have a non-suit entered; and subject to all the objections, directed the jury to find a verdict for the plaintiff, which they accordingly did.

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Upon a former day Mr. *Brewster*, Q. C., obtained a rule nisi to set aside the verdict and have a non-suit entered, against which

Mr. *Moore*, Q. C., with whom was Mr. *H. Martley*, now shewed cause. With respect to the objection as to the insufficiency of the stamp, upon the ground that this is not one lease, but three separate leases, that objection is answered by the clause of distress, which is to enter upon the whole of the premises, and the *habendum*, which is to hold them, their executors, &c., and a joint covenant to pay rent, keep the premises in repair, and a covenant to them jointly for quiet enjoyment. As to the second objection, that by receiving the lease in evidence, it was conceded to be a joint lease, and having proved one lessee dead, and the other two surviving, the right survived to the latter two; is there not evidence of a severance upon the face of the instrument? Is there not also proof of a separate enjoyment from the payments of rent by the executors, and also by the wife, without any regard to the co-lessees of Mathew Kennedy? Where one joint tenant dies and others survive, it is a question whether there was a severance. The landlord cannot deprive them of the right to sever, and if they do so the joint tenancy is destroyed, and the right to survivorship is destroyed also; and if the defendant determines to rely upon this objection, he should have had a question of severance or no severance left to the jury. There is an adverse holding for ten years, and that is evidence of a partition to go to a jury.—[PERRIN, J. Have you any authority for that position?—I have not at present any authority, but coupling that possession with the terms of the lease, I think the position is sustainable.—[BURTON, J. If there were no such terms in the lease, but it was a usual joint lease, would not the holding for ten years be evidence of a severance to go to the jury?—I think the separate holding for any length of time would be evidence to go to a jury, as being inconsistent with the tenure of joint tenancy, and coupled with the terms of the lease in the present case, I think it ought to be presumed that the lessees held separately, until the contrary was proved. The probate of the will shewed that Kennedy died in 1821, and this is not a contest between the joint tenants, but between the parties claiming under one of them. With respect to the objection for want of a notice to quit, the learned counsel took a wrong course in calling on the Judge to non-suit, or direct the jury to find for the defendant as being a yearly tenant. It is never to be taken as a question of law whether payment of rent created a tenancy from year to year; or *quo animo* rent was paid, but such question ought to have been left to the jury, if the defendant relied upon it.

Mr. *Brewster*, Q. C., *contra*.—The deed here is a separate lease to

the tenants; after reading the terms of the granting part, counsel contended that this was a perfect *habendum* of a portion to one and a portion to another.—[BURTON, J. The *habendum* may explain the granting part; that is the office of the *habendum*.]—If this be a grant to them separately, the *habendum* is to be taken according to the grant. What is the meaning of the contract between the parties, but that one should hold so much land and pay so much rent, and so of the others?—[CHAMPTON, J. A test for that might be who was bound to pay the rent?]—No, for that would depend upon the covenant, and if a party who took no estate covenanted to pay rent he would be bound.—[*Per Curiam*. We think the lease is a joint lease; but it may also operate as an agreement for partition.]—Then it would clearly require an agreement stamp. As to what Mr. Moore said in his answer to the objection that the defendant was a yearly tenant, where there is payment of rent clearly proved, and no evidence upon the other side, there is no question to be left to the jury. Payment of rent for seventeen years is conclusive of a tenancy from year to year, and if there be any agreement inconsistent with such tenancy, it ought to be proved.

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Mr. Martley replied.—As to this deed not being a separate lease *Knight's case (a)*, is conclusive. If money is expressly paid as rent it creates a tenancy from year to year; but if not expressly so paid, it is a question for the jury with, what view the payment was made? In this case, if the defendant insist on his payment to the head landlord as payment of rent to the plaintiff, he must shew the payment to have been made under such circumstances that he might maintain an action for money paid for the use of the plaintiff. Besides the tenant might have paid this in ignorance of his rights. Upon the whole of the case, if the Court yields to this objection, it must determine that the state of facts represented amounted to a tenancy from year to year.

BURTON, J.—The defendant and his wife were allowed by the executors to continue paying the rent of a certain portion of these lands, and this was, therefore, evidence that might be left to the jury.

CHAMPTON, J., thought there was no answer to the objection for want of an agreement stamp upon the lease.

PERRIN, J.

Strictly speaking, the evidence from which a tenancy from year to year is to be presumed ought to be left to the jury, but as the result would be the same we will not grant a new trial.

Rule absolute.

*Thursday, January 30th.*

**ASSUMPSIT—GUARANTEE—STATUTE OF FRAUDS.**

**NASH and Co. v. HARTLAND.**

A guarantee in the following words:—  
 "Cork, 31st January, 1837. Sirs, I will be accountable to you for payment, within six months, of the seed order forwarded by my son, R. A. H., and also for payment within three months of 600 barrels of vetches, to be forwarded by the first steamer.—I am, &c., Sarah Hartland. To Messrs. Nash and Co." (the plaintiffs). *Held*, that the consideration sufficiently appeared on the face of the instrument to charge S. H. with the price of the seed order. *Held also*, that this guarantee was not entire, and although the vetches were never forwarded, that the plaintiffs were entitled to recover for the price of the seed order which had been forwarded.

**ASSUMPSIT.** This was an action of assumpsit upon the following guarantee:—"Cork, 31st January, 1837. Sirs,—I will be accountable to you for payment, within six months, of the seed order forwarded by my son Richard A. Hartland, and also for payment within three months of 600 barrels of vetches, to be forwarded by the first steamer. I am, &c. Sarah Harland (the defendant). To Messrs. Nash and Co." (the plaintiffs). This case was tried at the Summer Assizes of 1839, for the city of Cork, before Mr. Serjeant *Greene*, and the jury found a verdict for plaintiff for £337. 5s. 6d., subject to the points made by the defendant's counsel, with liberty to move to have a non-suit entered. The declaration contained three counts upon the guarantee; the first count stated, that in consideration that the plaintiffs, at the request of the defendant, did sell and deliver to Richard A. Hartland a quantity of seeds, which he had theretofore ordered the plaintiff to forward to him, the defendant undertook and promised the plaintiffs that she would be accountable to them for payment within six months of the price and value of the said goods; and that plaintiffs confiding therein, did sell and forward to Richard A. Hartland the seeds which he had ordered; that the price of said goods amounted to £337. 5s. 6d., and that although the time for payment had elapsed, R. A. H., although requested, hath not paid, of which the defendant had notice, and yet the defendant hath not paid. The second count merely varied the statement by averring, that in consideration that plaintiffs would sell and deliver certain goods to R. A. H., the defendant undertook, &c.; and that the plaintiffs did sell and deliver to R. A. H. on credit, the goods so ordered by him; and although the credit and time for payment had elapsed, yet R. A. H. had not paid the plaintiffs, of which the defendant had notice, and yet the defendant

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\* The 7 W. 3, c. 12, s. 2, enacts "such action shall be brought, or that "No action shall be brought "whereby to charge the defendant "upon any special promise to "answer for the debt, default, or "miscarriage of another person; "unless the agreement for which "some memorandum or note there- "of, shall be in writing, and sign- "ed by the party to be charged "therewith, or some other person "thereunto by him lawfully autho- "rised."

hath not paid the plaintiffs. The third count stated, that in consideration that plaintiffs, at the request of the defendant, would forward to R. A. H. the goods required by a certain order, furnished to them by R. A. H., the defendant undertook to be accountable to plaintiffs for payment, within six months, of the amount of said order, that plaintiffs on the 24th of February, 1837, did forward to R. A. H. the goods required by the said order, for the price of £337. 5s. 6d.; that although time for payment elapsed, yet R. A. H. did not pay, whereof the defendant had notice, yet she hath not paid:—there were then a count for goods sold and forwarded to the defendant, and the money counts. The defendant pleaded the general issue. From the report of the learned Serjeant it appeared that the plaintiff produced and proved the letter of guarantee by Hartland, the defendant's son, the person named in the guarantee, that he had ordered seeds by order of 30th December, 1836; that the order was furnished, that the vetches were not supplied, and that they were not in the order referred to in the guarantee. On cross-examination this witness stated that he sent several seed orders before this, and that he counted most upon the 600 barrels of vetches in the guarantee which he never received. Mr. Cooper, on the part of the defendant, objected, first, that no sufficient consideration for the defendant's promise appeared upon the face of the guarantee; secondly, that the consideration was entire, and as part of the order was not furnished the defendant was not liable. There were two other objections, that the guarantee was not stamped, and that the seeds were not delivered by the first steamer; but they were not argued. The defendant produced one witness, but nothing turned upon his evidence.

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Mr. Cooper, in last Michaelmas Term obtained a conditional order to have the verdict set aside, and that a non-suit or verdict be entered for the defendant upon the two grounds already stated, against which

Mr. Maley, with whom was Mr. Collins, Q. C., now shewed cause.—As to the consideration expressed in the guarantee being indivisible and but part performed, the cases of *Hargreave v. Smea* (a), and *Mason v. Pritchard* (b), are authorities to shew that the Courts will construe such a guarantee a continuing and standing guarantee. With respect to the first objection, I admit that the consideration ought to appear on the face of the instrument, or be necessarily deducible from it. The word "order" on the face of the guarantee shews sufficiently the consideration; in *Joint v. Mostyn* (c), the agreement was to pay a certain sum in case a third person "did not within said period pay it by instalments of £1

(a) 6 Bing. 244.

(c) 2 Fox & S. 4.

(b) 12 East, 227.

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"per month, or such instalments as he shall make, or as that said sum shall be paid within that period," the time to be computed from the date of the agreement; and the Court held that the obligation of the third person to pay, and the forbearance or giving time of payment by the person to whom the guarantee was given, was by necessary inference deducible from the instrument, and that thus the consideration sufficiently appeared upon the face of the instrument. In *Stadt v. Lill* (a), a guarantee in these words, "I guarantee the payment of any goods which J. Stadt delivers to J. Nicolle," was held to contain a sufficient description of the consideration; and in *Russell v. Moseley* (b), where the instrument was in the following form:—"I hereby guarantee the present account of H. M. due to R. T. S., of £112. 4s. 4d., and what she may contract from this date to the 30th of September next," it was held that the consideration sufficiently appeared. In *Bateman v. Phillips* (c), a letter to the debtor's attorney saying, that the debtor would receive some money the following week, and "I trust you will give him indulgence until this day week, when I undertake to see you paid," was held to be evidence within the statute of frauds to charge the writer with the debt. The strongest case in our favor, and the most recent decision upon this subject is the case of *Emmott v. Kearns* (d), where the defendant said he would see the bill of a third party paid, it was held that he was responsible for the amount of the bill, and that the consideration sufficiently appeared. There was sufficient upon the face of the instrument to induce the plaintiffs to give the seeds to A. R. Hartland, and to shew that it was upon the faith of the guarantee the goods were to be sent. In the case of *Bewley v. Whiteford* (e), Joy, C. B., speaking of the consideration says, it is not necessary "that the memorandum must in terms express it; but that it may be collected by necessary inference," and that case was decided upon the ground that the guarantee "implies that Higgins & Co. had already bought the goods." In the present case the words "seed order" cannot be construed seed bought or seed sold, and they do not, therefore, raise the implication in *Bewley v. Whiteford*, but they imply an unexecuted contract, and if it were executed afterwards, it was by the inducement of this guarantee. The first step of a contract is ordering the goods by a person proposing to be the vendee; and it plainly appears that the instrument was forwarded when the contract was in its inception. By the terms of it, the goods were merely "ordered," not supplied or forwarded. The contract of guarantee in this case being accessorial to the contract for the sale of the seed, the words of Lord Ellenborough, in *Barton v. Fitzgerald* (f), are

(a) 9 East, 348.

(e) 15 East, 272.

(c) Hayes, 356.

(b) 3 Bro. &amp; B. 211; S. C. 6 Moo. 521.

(d) 5 Bing. N. C. 559; S. C. 7 Dowl. P. C. 630.

(f) 15 East, 541.

important: "Every part of an instrument may be brought into action, "in order to collect from the whole one uniform and consistent sense, "if that may be done." The case of *Wood v. Benson* (a), which is a very recent decision, meets the present exactly. In that case, the guarantee was to pay for all the gas which may be consumed in the theatre, while occupied by A. B., and also for all arrears which may be now due; and it was held that the agreement was void as to the arrears, but that the plaintiff was entitled to recover for the gas subsequently supplied. In the present case, the first part of the contract on which we declared was the only part of the contract which had to do with Richard A. Hartland; and the second part was an independent order for vetches for her own use. Upon these grounds, we are entitled to retain the verdict.

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Messrs. Cooper, Q. C., and Smith, Q. C., *contra*.—The guarantee or engagement in question either consists of two distinct branches, or it is one entire agreement. If it consist of two distinct branches, there is no consideration for the promise to be accountable contained in the first branch; if it consist of only one entire engagement, then it is void, because the vetches were never delivered at all. In *Theobald on Principal and Surety*, 7 Plac. 9, it is said, "The consideration must, at the "time the promise is made, be either wholly or in part executory; for "instance, if a person promises in consideration of something to be "done, it is an executory consideration, and sufficient; if in considera- "tion of something already done, it is an executed consideration, and "is insufficient."—[BURTON, J. Was there not some evidence that the goods were given upon the faith of the guarantee?—That would not be sufficient, for that would be aiding this agreement by *parol* evidence. In *Bewley v. Whiteford*, there was a bill of sale, and a guarantee at foot; it appeared clearly that *Bewley* would not give the goods without the guarantee. *Joy*, C. B., said in that case, "The result of all the cases "is, that the consideration must clearly appear from the guarantee "itself, either by express statement or necessary implication. The "consideration must be executory, unless a previous request appears. "If there be a doubt whether the consideration be executed or execu- "utory, and that that must be explained by *parol* evidence, the "guarantee is insufficient." In *Cole v. Dyer* (b), Lyndhurst, C. B., said, "If two distinct considerations may with equal probability be "inferred as the inducement to that engagement, the writing is not "taken out of the statute of frauds;" and in that case the forbearance was apparent upon the face of the instrument; and in *Whitmore v. Johnston* (c), BURTON, J. adopts the same rule of construction. In

(a) 2 Cr. & Jer. 94; S. C. 2 Tyrw. 28 & 1 Price, P. C. 169.

(b) 1 C. & Jer. 461; S. C. 1 Tyrw. 304.

(c) 1 Jebb. & S. 8.

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Howes v. Armstrong (a), the guarantee was in these words: "Inclosed
 "I forward you the bills drawn per J. A. upon and accepted by J. D.,
 "which I doubt not will meet due honour; but in default thereof, I
 "will see the same paid;" and it was held, in that case, that the consi-
 deration for the promise did not sufficiently appear, Tyndal, C. J.,
 adopting precisely the same rule of construction as in the previous cases.
 But it has been said, that the consideration for the promise need not
 appear in express terms, but it is sufficient if it can be made out by
 "necessary inference." These words are very loose, undefined, general
 terms. One man will see a necessary inference where another man will
 not; and the Courts, accordingly, are now disposed to hold that the
 consideration must appear in express terms. The words of Lord Lynd-
 hurst, in *Cole v. Dyer*, approach to such a doctrine; and in *James v.*
Williams (b), the guarantee, which was in the following words: "As
 "you have a claim on my brother for £5. 17s. for boots and shoes, I
 "hereby undertake to pay you the amount within six weeks from this
 "day," was held insufficient; and Patteson, J., alluding to *Cole v. Dyer*,
 said, "That case shews that you must be able to fix upon the considera-
 "tion on the face of the instrument, not as a matter of conjecture, but of
 "undoubted certainty;" and the same principle was acted upon in *Raikes*
v. Todd (c). In the present case, how does it appear that the goods
 were not sent before the guarantee was given? And the agreement was
 void if the credit was already? Or if there was a previous agreement
 that it should be given, the guarantee is *nudum pactum*. Now, it may
 be said, that the furnishing of the vetches mentioned in the guarantee was
 the consideration for the defendant's promise to pay for the seeds already
 ordered by A. R. Hartland; and the case of *Russell v. Moseley* (d) was cited
 in support of this view of the case, but that case was cited in *Wood v. Ben-*
son, and overruled; and besides, there is no count in this declaration
 upon which the plaintiff is entitled to recover in that view of the case,
 for in no one count is the supply of the vetches stated. In *Wood v. Ben-*
son, which has also been relied on, although the entire promise was
 stated, it was held that the plaintiff could not recover for the arrears,
 though it was insisted that the future supply of gas was the considera-
 tion for the promise of the defendant to pay the arrears, because the
 consideration was not expressed in the guarantee. The plaintiff was
 allowed to recover for the gas supplied, under the count for goods sold
 and delivered, the order for the supply of gas being an original order given
 by the defendant, and not a collateral promise to pay the debt of a third
 person. In the present case, there is no original order upon which a
 count for goods sold and delivered could be maintained; for the under-

(a) 1 Bing. N. C. 761.

(b) 5 B. & Ad. 1109; S. C. 2 Dowl. P. C. 481. 1 Scott 66 & 1 Hodges 215.

(c) 1 P. & Dav. 138.

(d) 3 Bro. & B. 211.

taking here is, to be *accountable* for the payment of 600 bushels of vetches within three months, that is, accountable for a third person; and in *Raikes v. Todd* (a), it was contended that the future advances constituted the consideration for the defendant's promise to pay the past advances, but the Court held that such consideration did not appear upon the face of the instrument. But supposing, in this case, that the supply of the vetches was the consideration for the defendant's promise to pay for the seeds already ordered, inasmuch as those vetches were never supplied, the defendant is discharged from her engagement. "If the creditor neglects to perform, or performs defectively any of the conditions, express or implied, which are incumbent upon him, or any of the terms which collectively form the consideration either of the surety's contract, or of the contract to which the surety acceded, the surety is discharged, or, rather, his liability never attaches;" *Theobald on P. & S.* 154, *Plac.* 183; and this doctrine was acted upon in *Bacon v. Chesney* (b), in which case Lord Ellenborough said, "The claim against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to shew that the terms of the guarantee have been strictly complied with. If I engage to guarantee, provided eighteen months' credit are given, the party is not at liberty to give twelve months' only, and, at the end of six months more, to call on me." The same point, namely, that a strict compliance with the terms of the guarantee is necessary to enable the party to recover, is established in *Glyn v. Hertel* (c), *Holl v. Hadley* (d), *Evans v. Whyte* (e), *Whitcher v. Hall* (f), and *Combe v. Woolf* (g); *Clarke v. Gray* (h), where Lord Ellenborough says, "That in the case of an agreement, not under seal, the consideration must be stated, and no part of the entire consideration for any promise contained in the agreement can be omitted;" and in *Miles v. Sheward* (i), Le Blanc, J., says, "Where the plaintiff states the consideration for the promise of the defendant, he must state the whole consideration, for otherwise the contract is not truly stated;" and the same principle is stated in *Chitty on Contracts*, 341, 343. The general doctrine, that proceedings against sureties are *strictissimi juris*, is laid down in *Birkmyr v. Darnell* (k), and in 2 *Starkie on Ev.* 371. The words in the conclusion of the guarantee, "To be forwarded by the first steamer," apply as well to the seed order as to the vetches; and if so, the contract is manifestly entire, and but partly performed.

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(a) 1 Per. & D. 138.

(b) 1 Stark. N. P. C. 192.

(c) 8 Taunt. 208; S. C. 2 Moo. 134.

(d) 2 Moo. & P. 136; S. C. 5 Bing. 54. 2 A. & E. 758, & 4 Nev. & M. 515.

(e) 3 Moo. & P. 130; S. C. 5 Bing. 485, & 1 M. & M. 468.

(f) 5 B. & C. 269.

(g) 8 Bing. 156.

(h) 6 East, 568.

(i) 8 East, 9.

(k) Smyth's L. Ca. 135.

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Mr. Collins, Q. C., replied, and relied upon *Hargreave v. Smee* (a), *Pace v. Marsh* (b), *Lysaght v. Walker* (c), *Morris v. Stacey* (d), as to the first branch of the case; and that *parol* evidence was admissible to shew that the contract was not performed until the guarantee was given, *Bateman v. Phillips* (e), *Shortrede v. Cheek* (f).

Friday, January 31st.

BUSBY, C. J.

This case comes before the Court upon points saved at the trial. It was an action of *assumpsit* upon a guarantee signed by the defendant—[reads it].—It appeared in evidence, that upon the 30th of December, 1836, Richard A. Hartland sent an order to the plaintiff for a certain quantity of seed, which amounted to £337. 5s. 6d, and which, it was proved, was subsequently furnished to the defendant. About a month after this order was sent, the defendant gave the guarantee upon which the action has been brought. The declaration contains three counts. The defendant pleaded the general issue, and there was a verdict for the plaintiff for the sum of £337. 5s. 6d. Mr. Serjeant Greene has reported that three objections were taken at the trial, but counsel for the defendant have confined themselves to two of the objections: first, that there is no consideration for the promise upon the face of the guarantee; and secondly, that the guarantee was entire, and that the plaintiff was bound to deliver the vetches as well as the seed; and they having proved at the trial that the vetches were not furnished, the plaintiff was not entitled to recover. As to the first objection, it is sufficient for us to say, that there is enough to satisfy the Court that the contract was executory, and, therefore, a good consideration for the defendant's promise. The second objection is founded upon the assumption that the contract for the seeds and the vetches was entire; and if that were so, the argument on the part of the defendant would be irresistible. But upon a consideration of the language of the guarantee, and the terms of the contract, we conceive they constitute two distinct branches, one for the seed, the other for the vetches. In order to sustain this objection, the defendant's counsel were obliged to make the last words of the guarantee override the entire previous part of it, although the rule is, to refer them to the next immediate antecedent; and, independent of this, we find the two contracts wholly different, one for payment in six months, the other for payment in three months. In this view of the case, and upon the authorities which have been cited for the plaintiff, we are of opinion that the verdict ought to stand.

Rule discharged, with costs.

(a) 6 Bing. 244.

(c) 5 BH. N.S. 1.

(e) 15 East, 272.

(b) 1 Bing. 216; S. C. 8 Moo. 39.

(d) 1 Holt. N. P. 153.

(f) 1 Ad. & B. 57; S. C. Nev. & M. 366.

## COMMON PLEAS.

*Thursday, April 23d.*

### PRACTICE—LIBERTY TO ISSUE NEW WRIT.

LEYCESTER and others v. SWEENEY.

MR. LANE applied to the Court for liberty to issue a new writ of *copias ad satisfaciendum*, notwithstanding one had issued more than a year since. It is not a year since the return of the writ, and the practice of the two other Courts is to allow the writ to issue again, if it be not a year since the return.

Liberty given to issue a second writ of *ca. sa.* more than a year from the issuing of the former one, varying the former practice of this Court.

COURT.—We have no objection to granting your motion, although, since the year 1821, long before Mr. Plunket became Prothonotary, the practice of this Court has been, that the year shall run from the test of the writ. We will inquire as to the practice of the other Courts and make our rule in accordance.—A similar application was granted in another case.

Motion granted.

[A certificate has been procured from the other Courts, and it is expected that the practice will be here settled.]

*Thursday, April 30th.*

### SETTING ASIDE PROCEEDINGS—PROSECUTION FOR PERJURY.

COMERFORD v. BURKE.

MR. MACDONAGH moved to make absolute the conditional order of the 17th of January; and for the costs of the several former motions, and of the present application; or, that the said conditional order, and the proceedings thereon, that is, that the parliamentary appearance, and all the subsequent proceedings had and taken in this case be set aside, and

On satisfying the Court that the defendant was not served with process, it set aside all the proceedings, including execution (al-

though otherwise regular, and though the defendant was thereby enabled to plead the late statute of limitations, a complete bar to the action). Although by a former order the costs of the proceedings were to abide the event of the prosecution of the process-server for perjury, the Court gave the costs to the defendant on motion, notwithstanding a conviction was not had on the prosecution.

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that the alleged service of the process be deemed a nullity, and the affidavit of the process-server be taken off the file to prosecute him for perjury ; or, that the proceedings be farther postponed until after the next Assizes, and a farther trial of the process-server be had. The plaintiff has shewn no cause by affidavit. In pursuance of the order of the 24th January (*a*), there was a prosecution at the last Assizes for the county of Mayo. The only defence attempted was, that another person was served in mistake for Mr. Burke. Mr. Burke was examined, and gave most satisfactory testimony that he was not served. The jury were in their room all night, and next day eleven of them told in open Court, that they were for a conviction ; one alone disagreed, but would not assign a reason. The day on which the writ was alleged to have been served was within a few days of the defendant's action being barred by the statute of limitations. I, therefore, respectfully press that all the proceedings shall be set aside, that we may not be deprived of our plea to any new action the plaintiff may commence.

Mr. *Fitzgibbon* and Mr. *R. Ireland*, who were present at the trial, were with Mr. *Macdonagh* on the motion.

Mr. *Baker*, *contra*, contended that the Court would not set aside the regular proceedings which had been taken against the defendant, at least without another prosecution of the process-server. I held in my hand writs issued against the defendant in 1837, and even so far back as 1836, which shew that early proceedings were taken.—[*JOHNSON, J.*, Are you willing on the part of the plaintiff to take an issue, service or not service ; under the circumstances that will decide the case ; as if the writ were served, and the merits be with you, the judgment must stand ?]—On this being declined, Mr. *Baker* contended that even though the Court decided against his client on this motion they would not so vary their order of the 24th January, that “the costs of the various proceedings should abide the event of the prosecution” as to decide on giving costs to the defendant.

DOHERTY, C. J.

Is the Court to suspend its order to wait upon a succession of obstinate juries and abortive trials ? It is just possible that your process-server is also a traitor, and has betrayed you. I do not think we are asked to vary our former order in giving the defendant the costs, but to give to the spirit of it a liberal construction.

Let the conditional order of the 17th January last be made absolute, with costs ; and let the plaintiff pay the costs of the several

(*a*) *Ante*, p. 87.

proceedings had in this case, pursuant to the said conditional order, and the order of the 24th of January last, and of this motion.

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On a subsequent day Mr. *Macdonagh* applied for an order on the Officer to review his taxation. The order of the 30th April, directed that "the plaintiff do pay the costs of the several proceedings had in this cause, pursuant to conditional order," &c. The Officer refuses to allow us the costs of the criminal prosecution.

Mr. *Baker*, *contra*, contended that this was an application not to review the taxation, but to enlarge the terms of the former order, and asked for the costs of this motion.

*Per Curiam*.—We were not asked specifically to give these costs on the former motion, and, although the order may at first appear doubtful, yet it is not likely that we intended to include, unasked, such an important matter in our order. The motion might have been to give these costs if we intended by our order to do so, or if we did not, to rectify it. Another application may be made, but at the peril of the costs of the motion, and of this one, if unsuccessful.

Mr. *Baker*, after consulting his client, said he would rather forego the chance of costs than submit to the delay, therefore,

*Per Curiam*,

No rule on this motion.

—♦—  
Friday, May 8th.

## PRACTICE—SUBSTITUTION OF SERVICE.

KNIFE v. O'REILLY.

MR. C. HILL moved to have the service of the *capias* in this case deemed good service of the defendant. The affidavit of the process-server states, that he went to the house of the defendant at Clonsilla, county of Meath, on the 14th of April, when defendant's steward refused him admittance. On the 16th he went again and used every exertion to serve defendant, but without being able to do so. On the 18th he was again refused admittance by the steward. On the 22d he went in the disguise of a beggarman, and after being concealed some time, got into the hall, when the door was opened by the housekeeper

Service of a writ on defendant's servant deemed good service of defendant, giving him notice by a letter through the post-office, inclosing the writ, although it was out of return.

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at the laborers' dinner time. After some delay, and seeing no prospect of effecting a personal service, and fearing bodily harm, he left a copy of the writ with the said housekeeper, after which he was pursued by a number of persons who came out of the house. On the road he met defendant's post-boy, who told him that the defendant was secreted in his house to avoid law process.

ORDER:—Let a copy of the writ or process against the defendant be inclosed in a letter directed to the defendant, together with a copy of this order, and put into the general post-office: and let the service of the said writ or process on defendant, as mentioned in the plaintiff's affidavits, and an affidavit stating the sending a copy of said writ or process directed to the defendant at his place of residence, be deemed good service of said writ or process on the defendant, the same as if personally served on him; and let plaintiff be at liberty to proceed thereon.

*Monday, May 12th.*

Mr. *Hill* applied to amend the order of the 8th, stating that the writ was out of return, and that, therefore, the Officer must have made a mistake in making it out, as service of the writ now would be useless.

*Per Curiam.*

The order is quite right, it is as notice that the copy of the writ is sent, and not as service.

*Friday, May 8th.*

#### PRACTICE—SUBSTITUTION OF SERVICE.

GILLESPIE v. CUMMING.

The Court refused to allow the service of a writ on the agent here of a party in France to be good service of the party. If a sufficient attempt be unsuccessfully made, the Court will assist.

MR. FLANAGAN applied to the Court that the service of a copy of the writ of *scire facias* upon William Atkins, Esq., the agent and representative of the conusor, at his residence in the county Cork, be deemed good service of the conusor. The conusor is in France, out of the jurisdiction, and there is strong reason to believe that personal service will be impracticable. This Court granted a similar motion in the case of *Happer v. Irwin* (a). There the service of the widow of the conusor, residing in Ireland, was deemed good service of the heir,

(a) Smythe, 155.

who was gone to America. Our case is much stronger, for we are proceeding against the consor himself.

Mr. H. Smythe, *amicus curiæ*, cited a case of last Term where the Court refused to substitute service of a party in Belgium.

Court.—Attempt a service of the party himself, and if you shew a difficulty we will then assist you.

NOTE.—From the many ineffectual attempts to get service which is not personal, deemed good, it would be well to consider when the circumstances are strong enough to give a moral certainty of its being granted. Here are three cases within a short period. In *one* the service was allowed of the party in America, remote and difficult of access. Of the case in Belgium the Court remarked

that there are regular packets plying constantly; and, from any thing which appeared to the contrary, the party in France might be situated so as to enable a personal service, with more facility than within a few miles of Dublin. The Court very distinctly intimated that if an attempt be made, and a *sufficient* difficulty shewn, they will not be wanting in rendering assistance.

Saturday, May 9th.

#### PRACTICE—ENROLLING OLD JUDGMENT.

Executors of MARTIN v. Heir and Ter-tenants of M'CAUSLAND.

On the 25th of January Mr. J. Brooke, Q. C., with Mr. J. Sheil, applied for liberty to have a judgment of revival of Trinity 1823, against Charles Richardson, the acting executor of Marcus Langford M'Causland, enrolled as of that Term. The original judgment was of Trinity 1808, by Samuel Martin against M. L. M'Causland, for the penal sum of £400 Irish, besides costs. The consor died in 1809, leaving the Rev. M. M'Causland his eldest son and heir-at-law. The affidavit of John Martin, eldest son and acting executor of the consor, states, that pursuant to an order of this Court of June 1823, a *scire facias* issued against the executors of M. L. M'Causland, which he personally served on the said Charles Richardson, that the judgment was revived in Trinity Term 1823, that immediately a *fiery facias* issued against the said C. Richardson, to the sheriff of Londonderry, but no money was levied; that the original debt of £200 Irish, besides all interest from the entry of the judgment, and costs, are still justly due to deponent

Judgment of revival of Trinity Term 1823 ordered to be now enrolled as of that Term although the original pleadings in *sci. fac.* are not forthcoming.

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as such executor. That on the 7th of June, 1839, he procured an order to revive the said judgment against the heir and ter-tenants of the conusor; that the writ issued and was served upon them; that he moved on the said writ, and the several tenants pleaded, amongst other pleas, the statute of limitations. That being advised to procure a copy of said judgment of 1823, he went to the proper office, but could neither find any entry in the book, nor a judgment on the roll. That he found in the rule-book the rule to issue said *scire facias*, and the rule to plead thereto, and in the book in the Prothonotary's office that the stamp duty was paid for marking judgment. Also, in the seal-book an entry of said *scire facias* having been sealed on the 11th June, 1823, and also an entry of the writ of execution having been sealed 23d June, 1823; that he then searched the office of the *custos brevium*, but could not find the writ; that he found entries in the office where the writ was prepared, also of the writ having issued, and judgment having been marked. That he is very desirous to reply to the said pleas, which, he is advised, he cannot do without a copy of the said judgment.

Mr. *D. M'Causland* opposed the motion on the preliminary grounds of the present defendants not having been parties to the action of 1823, and that his clients, who pleaded the statute of limitations, would be deprived of its benefit if the motion were granted, and that Charles Richardson, the executor, was not served with the notice of this motion. The motion was refused on the latter ground.

On the 23d April the case was again mentioned. Richardson had been served in the interval, and searches made in all the Law Courts for revivals of judgments against the conusor, his heir or ter-tenants, for upwards of twenty years, but not one could be found. Likewise for judgments re-docketed since June 1828: but the only one which could be found is the one in question, which was re-docketed in 1833. The Court granted a conditional order.

This day Mr. *T. B. C. Smith*, Q. C., came in to shew cause against the conditional order.

Messrs. *J. Brooke*, Q. C., and *J. Sheil*, *contra*, cited — v. *Spelman* (a), and the order made in that case. The error there was of the Officer, and the Court shewed their anxiety to repair it. The order was such as to prevent any injury to the third person. See *Murland v. Corry* (b), *Grant v. Hunt* (c).

(a) 2 Lord Ken. 442.

(b) 6 L. R. N. S. 99.

(c) 1 L. R. N. S. 9.

Mr. *M'Causland*, in reply.—This motion has been argued as if it were an application merely to enrol a judgment *nunc pro tunc*, but it goes much farther: it is, in effect to make up and sign a judgment after a lapse of seventeen years, and that too without a vestige of a record from which it can be done. The writ is lost, and there are not any pleadings in existence. This, I contend, with great respect, is not within your Lordship's jurisdiction. Not one precedent has been quoted to support an application such as this, which, alone, is sufficient to induce your Lordships to reject it. As to the case in *Lord Kenyon's Reports*, the order was merely to bring the roll of a judgment into Court, not to make up the judgment; and it must be presumed the pleadings were forthcoming, as nothing is stated to the contrary. These circumstances essentially distinguish that case from the present one, where the original pleadings are not forthcoming, *White v. White* (a). There was a mere clerical error, and there was something to identify the judgment of revival by. The limits of the jurisdiction of the Court are laid down in *Roll. Ab208*, G. Pl. 2. The same rule may be collected from *Blackamore's Case* (b), and in this respect we find the following passage, which seems exactly in point:—"For it was resolved that in both cases, as well "where the record becomes imperfect and erroneous by voluntary "offence of the clerk, as by his careless negligence, that it should be "amended, for all is within this general word, misprision of the clerk; "but if such part of the record which is so stolen, &c., or which appears "not, cannot be supplied by the other parts of the record, nor by any "exemplification made of the record, then it cannot be amended." The statutes of amendment are only for clerical errors; here there is a substantial omission. *Dunbar v. Hitchcock* (c). It is said that the inconvenience here arises from the neglect of the Officer, and on that ground the Court seem inclined to grant what is desired; but there is no proof that the Officers did not do their duty; and even if there were such neglect, *Lord Mohun's Case* (d) shews that the Court would not make up a judgment in the absence of the necessary materials. As to the lapse of time, *Flower v. Lord Bolingbroke* (e) is a strong case for us.

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Substantially, this is the ordinary motion to enter a judgment, not exactly, in this case, *nunc pro tunc*, but as of the time it ought to have been entered, which, by some fatality of our Officer, has not been properly entered. Even within these ten years, since I first sat upon this Bench, such motions have been of frequent occurrence. If the

(a) 6 Law Rec. N. S. 397.

(b) 8 Coke, part 8.

(c) 5 Taun. 820.

(d) 6 Mod. 59.

(e) 1 Strange, 639.

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Court be satisfied that the party has done all that he had to do, and that there has been no neglect in him, and that he has gone through all the regular stages, and paid the fees and the duty, if there have been an omission or mistake in the office, it would be monstrous that he should be deprived of what may be of such importance to him hereafter. The party shews that all has been done here by the attorney anterior to enrolling the judgment; but he has gone farther, and shewn that proceedings were taken as if the judgment were properly enrolled, and which could not have been done if it had not been properly entered. The party was thrown off his guard, until, by a searching investigation, he found the mistake. Our order does not conflict with the authorities Mr. *M'Causland* has brought forward; we entirely agree with them as good in themselves, but those were cases where the neglect was of the attorney. If we found that the case here was under similar circumstances, we should have been very careful how we acted. We do not pronounce upon the rights of the parties. I do not use too strong language, when I say that the party demands at our hands, *ex debito justitiae*, that we shall have this judgment enrolled. Disallow the cause shewn; and when we make up our order, we will take care that no injury can be done to third persons, and frame one which will serve the passing purpose.

Ordered, that the cause shewn be disallowed, and the order made absolute, and that said judgment be now enrolled as of Trinity Term, 1823, plaintiff to enter the rules on the *scire facias* in this cause *de novo*, and the costs of this motion to abide the event; and if defendants think necessary to change the pleadings, or any of them, and to plead anew, the costs of such new pleading, or change of the pleadings, shall also abide the event of this suit. And, by consent, it is ordered that such enrolment of said judgment shall not operate to the prejudice of any person who may, prior to the issuing of said *scire facias*, have bought for valuable consideration, the interest of said Marcus Langford M'Causland in any lands or tenements of which he was at any time seized, or to the prejudice of any person who may have obtained a judgment, since Trinity Term, 1823, against said Marcus Langford M'Causland, or his executor, or his heir and terretenants.

Monday, May 11th.

LEASING POWER—CONSTRUCTION—LEASE OF LIVES  
RENEWABLE FOR EVER.

SMITH v. CLARKE.

ON a former day, the Court said this was a case of importance (reported *ante*, p. 78), and desired to hear one counsel more on each side.

Mr. Moore, Q. C., for the defendant, repeated and pressed his former arguments, admitting the lease to be good for the three existing lives, and entirely giving up the point that the words "consistent with their respective interests therein" refer to the persons, not to the tenures; but insisting that the covenant for renewal is in effect a contract for a new lease, which would be in reversion; and also, that the absence of a clause of re-entry invalidated the lease.

Mr. Smith, Q. C., *contra*.—Mr. Moore's argument would go to prove, that even if the words "consistent with their respective interests" were not in the power, although, as he admits, a lease for 10,000 years might be made of the fee-farm lands, a lease of lives renewable for ever could not. But, as the words are there, I will get rid of the argument at first advanced by Mr. Holmes, that they are applicable to the persons, not to the tenures. That would render the power wholly inoperative, 1 *Sug. on Powers*, 522, referring to *Hele v. Green* (a). *Maunsell v. Russell*,\* a strong case, not reported, shews that the tenant

*Held*, that a lease for three lives (other lives than those in the head lease, which was for lives renewable for ever), and a covenant for perpetual renewal, are a valid execution of a power to the successive tenants for life, to " demise or lease for any term or number of lives or years consistent with their respective interests therein, to commence in possession, and not in reversion," &c.

(a) 2 Ro. Abr. 261.

\* *The Reporter has been favored with a note of the following important case by Mr. Napier:—*

LAW EXCHEQUER, Nov. 26TH, 1823.

EXCEPTIONS TO VERDICT—ASSIGNEE OF LESSEE—INTEREST.

*Maunsell v. Russell.*

This case came before the Court on a bill of exceptions to a charge of BURTON, J., at the Limerick Summer Assizes, 1823, who directed a verdict for the plaintiff. It was an action of covenant by plaintiff, as reversioner, against defendant, as assignee of lessee.

Defendant pleaded, first, *non est factum*: secondly, that she was not assignee. On the first, the defendant relied on a variance, but it not

having been stated in the bill of exceptions, was overruled.

[M'CLELLAND, B., stated that the Court of Error had decided, that in such a case the variance should be specifically stated in the bill of exceptions.]

On the second issue, the facts were these:—The lease was for lives, and the interest of the lessee vested in one Russell, who was admitted to have been assignee of

R., assignee of a lease for lives, devised the lands to trustees, in trust for his wife, for life, remainder over for the whole of his interest: *Held*, that the wife was assignee of the testator's entire interest.

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for life under a settlement represents the entire estate. The words "consistent," &c. are to prevent him with a term for years giving a freehold lease. Again, it is said the tenant for life may make a lease for 10,000 years of the fee-farm lands, but he cannot make a lease for lives renewable for ever, for such would be a lease in reversion; and it is compared to a lease, and a covenant to make a new lease at the expiration of the first. But is not our case quite different? The second lease would be an entirely new instrument; and some authority should be shown that a lease for lives renewable for ever is, in some respects, a lease in possession, and in some, *in futuro*. The renewal is a graft on the original lease. *Long v. Rankin* (a). The lease there was one for both lives and years. Chief Justice Abbott, in the judgment, p. 540, says, that the effect of leases in Ireland, for lives and years concurrent, is analogous to that in England for lives, and years at the expiration of the lives, and that powers are to be construed with reference to the custom of the country in which they are used: that case proves that such a lease is not in reversion. As to the general feeling of the Courts in England respecting what may be called unlimited

(a) 2 Sug. on Powers, 539.

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the lessee. Russell, by his will, devised the lands to trustees, in trust for his wife (defendant), for life, remainder over, for the whole of testator's interest, and died. Upon this, it was contended, for the defendant, that she was not assignee of Russell's entire interest. Mr. O'Connell and Mr. Cooper argued for the defendant, that tenant *pur vie*, making a conveyance *pur autre vie*, is a lease, and not an assignment. Secondly, that to be liable as assignee, the whole interest should vest in the defendant, and referred to *Co. Litt.* 42, a; 1 *Prest. Abstr.* 352; *Hughes v. Howlin*, K.B.; *Poultney v. Holmes*, Str. 405; *Crusoe v. Bugby*, 3 Wils. 234; *Kinnersley v. Orpe*, Dougl. 56; *Holford v. Hatch*, Dougl. 183; 2 *Roll. Abr.* 497, Pl. 8.

Mr. Blackburne and Mr. R. W. Greene, for the plaintiff, contended, that as the whole estate of Russell passed to the trustees, the defendant took the entire interest to enjoy it during her life. Thus, that she had not a limited

estate in the entire interest, and carved out of it, but the entire interest for a limited time. Authorities cited for plaintiff:—*Palmer v. Edwards*. Dougl. 187, per Buller, J.; *Isherwood v. Oldknow*, 3 M. & S. 382; *Co. Litt.* 45, a, 49 a, 143, a; *Derisley v. Custance*, 4 T.R. 75; *Moore*, 93, Pl. 230; *Shepp. Touch. by Preston*, 199; *Co. Litt.* 385, a; *Randal v. Brown*, cited in 5 Rep. 97. *Vide Glib. on Ten.* 84, 85, 98; 2 *Inst.* 505; *Sherewood v. Nonnes*, 1 Leon. 252.

The Court admitted that there was not any authority exactly upon the point, but decided in favor of the plaintiff, chiefly on the ground of the analogy of cases of warranty put in *Co. Litt.* 385. They also were of opinion that this did not at all interfere with the decision in *Hughes v. Howlin*. *Vide Pinker v. Litcott*, Bridg. 376; *Averill v. Holmes*, cited in *Peake's Evidence*, which case appears to be that of an equitable estate in the assignee, as is manifest from the context.

powers, 2 *Sug. on Powers*, 362-3-4, and the cases there referred to. In *Talbot v. Tipper* (a), referred to by Sir E. Sugden in *Musherry v. Chinmery* (b), he says, "That Courts have been often mispending their time in seeking to introduce qualifications where parties have used general expressions, and not taken the trouble to explain the intention to use them in the restricted sense." Again, Mr. Moore argues that from the terms of this power, it appears the settlor did not intend to authorise leases of lives renewable for ever: but when your Lordships are called on to construe according to the intention of a party, when we know that such leases were constantly used in Ireland at the date of the settlement, and where it is conceded that a lease for ten thousand years might be made of the fee-farm lands, if the Court be satisfied that the words "consistent with their interests" refer to the tenure, will it not bear in mind that leases for lives renewable for ever were the prevailing practice at the date of the settlement? They were introduced very much for the purpose of preserving the undoubted evidence of title, by the tenant having dealings from time to time with the landlord, and to avoid the great inconvenience of long leases. Now, as to whether, in point of law, the renewal be a new lease, constantly only a label is added, not containing any covenant, Suppose, in a case like ours, lives were added in a label, by what action could the rent be recovered? Covenant, making profert of the deed, and averring that the life was added by a label, a demurrer would not hold against that; and so thought Judge BURTON in 2 *Hud. & Br.* 306. It could not be contended that the covenant in the original lease was at an end. Lord *Guillamore* uniformly held, at the law side of the Exchequer, and it has always been the opinion of the Bar, that the original lease, with the new lives added, is a continuing lease. If the new life be named within the six months, and every condition be critically complied with, the lease is good at law as a continuing lease, by enlargement at common law. *Jack v. Reilly* (c), and dictum of BURTON, J., p. 306, and the able note of Mr. *Hudson*.—[DOHERTY, C. J. We are now for the first time called on, without authority, to refuse the power, and say that this is a lease in reversion.]—Possibly, if there be only one part of the lease, and the landlord, whose it is, says, you shall not indorse on my lease, the tenant may be driven to equity; but if he assent, and all be done, whether by label or indorsement, and that be good, what is the difference if a new lease in form be made? Is our freehold power to be limited, and our chattel unlimited? In *Lord Stafford's Case* (d), the doctrine of enlargement is laid down.—[DOHERTY, C. J. Even if you cannot get an express authority on that point, the

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(a) *Skinner*, 427.  
(c) 2 *Hud. & Br.* 306.

(b) *Lloyd & G. Temp. S.* 225.  
(d) 8 *Rep.* and 2 *Hud. & Br.* 307, note.

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received intention of the profession will go a good way with us when going on the opinion of the party.]—Just so: but perhaps that is unnecessary. As to renewal fines, *Tuthill v. Adamson* (a). The meaning is, that you shall not sell *pro tanto*. The only remaining observation of Mr. Moore is as to the clause of re-entry, that there may be six months, or six years, in some cases, when, by all the lives dropping together, the remainder-man may be without any instrument to recover his rent. But such a case is not to be presumed. The clause is introduced solely because a life is to be added on failure of each former one, and the effect of the statute law in Ireland is to put the clause into every lease. *Atkins v. Sealy* (b). In the case supposed, the tenant for life should bring his ejectment on the title. The moment the third life is gone, the doctrine of enlargement ceases for the tenant; and if he file his bill, he must pay every shilling of fines before he can get relief. That the lease for three lives is good is admitted, and it must be fed out of the equitable interest of the settlor, which was the very case in *Hackett v. Hobart* (c). As to the meaning of the words estate or interest, *Langley v. Langley* (d), a case of great authority, that they mean the legal or equitable estate; *Orpen v. Moore* (e). The moment it is proved that it is the equitable estate or interest which is to feed the case, that moment our question is settled. The settlor has the legal estate for three lives, and an equitable interest amounting to a perpetuity, and the lease is consistent with the interest he had. There is not any case so misunderstood as *O'Brien v. Grierson* (f). The grounds upon which the lease there was objected to were, that an advance of money was made on the same day with the lease, and that the lands were not let at the best rent. Lord *Manners* had no reference to this question, and the omission of the able counsel engaged to remark the point, is a strong opinion, for us, that they felt unable to sustain it.

#### CERTIFICATE.

This case has been argued before us by counsel, and we are of opinion that the indenture of lease and release, bearing date the 10th day of November, 1783, and the covenant for the renewal thereof therein contained, are warranted by the leasing power contained in the indenture of marriage settlement, bearing date the 26th day of June, 1781, executed on the intermarriage of Thomas Palmer and Mary Palmer.

Dated this 22d day of May, 1840.

JOHN DOHERTY.  
WM. JOHNSON.  
ROBERT TORRENS.  
N. BALL.

(a) 3 L. R. N. S. 156.

(c) 1 Jones, 288.

(f) 5 Law Rec. N. S. 249.

(b) Alc. & N. 363, 365.

(d) Lloyd & G. Temp. P. 361.

(f) 2 B. & B. 323.

*Tuesday, May 12th.*

**PRACTICE—TIME TO PLEAD ALLOWED.**

**DICKSON and another v. GERTY and others.**

MR. SPROULE asked to be allowed one or two additional days to rejoin to the replication in this case. This is the last day to rejoin. Notice has not been served on the other side, but the circumstances are peculiar. The action is about a right of way. The venue is Cavan, therefore a trial cannot be had until next assizes. The declaration was filed on the last day for declaring in Hilary Term; the pleas were put in within the proper time, and the replication was not filed until last Friday. A copy of it was ordered on Saturday morning, and not gotten until Monday night, and the replication contains 42 sheets.

Time to rejoin enlarged (though notice of the application was not given), under peculiar circumstances.

COURT.—We will enlarge the time until to-morrow, and let a notice be served to-night, saying that it is by leave of the Court you do so, and that you will move to-morrow for further time.

[NOTE.—It was not necessary to apply again, as the replication was ready before morning.]

*Tuesday, May 12th.*

**PRACTICE—LIBERTY TO PROCEED.**

**DALY, Administratrix of DALY, v. KELLY.**

MR. R. DALY moved for liberty to proceed in four *scire facias*, giving one Term's notice, notwithstanding issue being joined more than six years. The plaintiff has been a very poor person, but has lately got means to enable her to proceed.

Liberty given to proceed after issue joined more than six years.

Mr. Close, *contra*.—The affidavit for the plaintiff is made by her attorney, whereas it should be by herself, an administratrix, alleging poverty for the delay; besides, the affidavit does not state that there were not assets.—[COURT. A slight reason is enough to let the party in.]—At all events, my client is to be freed from the terms which were imposed upon him formerly, *i. e.* that his only plea should be payment, and that he should give evidence of actual payments, and that he should not plead the late statute of limitations.

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COURT.—Mr. Daly will remit the special terms in whichever of the cases they were imposed, and the defendant to have costs of this motion in the same.

Application granted.

—◆—
 Wednesday, May 13th.

PRACTICE—DISCHARGING NOTICE—COSTS.

LAIRD v. LAIRD.

The defendant is entitled, on the last day of Term, to discharge plaintiff's notice of motion, with costs, it not being in the list.

MR. R. BOYLAN applied to discharge the plaintiff's notice of motion in this case.

COURT.—The notice is not in our list. You are entitled to discharge it, with costs, as it is the last day of Term. If it were not, your course would be, to put it in the list, and move to discharge it with costs.

Notice discharged, with costs.

—◆—
 NOTE.—The rule of the Common Pleas, mentioned in *Stewart's Forms*, 967, 3d edit., "That in actions upon the case, trespass for goods, assault or imprisonment, arising in any county, be held in the proper counties, unless they arise where Justices of *Nisi Prius* do seldom come," is obsolete, as the Justices go equally often to every Assizes. *West v. McClelland*, Smythe's R. 286.

—◆—
 SITTINGS AFTER EASTER TERM.

Coram DOHERTY, C. J.

Tuesday, May 19th.

PRACTICE—VENIRE FACIAS—HABEAS CORPORA
 JURATORUM—CHALLENGE TO THE ARRAY.

KEOGH v. WALKER.

Challenge to the array, because the jurors in this case, or any of them, were not summoned to serve upon the said jury six days before the day named for trial, overruled.

MR. MACDONAGH and Mr. M. Murphy, for the defendant, before the jury were sworn in this case, tendered a challenge to the array, declining to allow the cause to be tried by the same jury who had tried other previous cases.

Mr. West, Q. C., objected that the challenge was too late, the jury in the box having been sworn, upon the first case tried, to try every case for trial during the Sittings in this Court.

The CHIEF JUSTICE overruled the objection, as such a course was adopted only for convenience, but did not bind the defendant, unless upon consent. He was therefore at liberty to insist that the jury should be sworn in his particular case, and to challenge the array if he thought fit.

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Mr. *Macdonagh* then put in a challenge to the array in the following terms:—"Because that six days before the said, &c., in the year last aforesaid, the said jurors, so impanelled as aforesaid, were not, nor was any of them, nor any juror of the county of the city aforesaid, summoned to serve upon the said jury in the said Court of *Nisi Prius* at the said, &c., for the trial of any issue therein, by virtue or in pursuance of any writ of *venire facias*, *habeas corpus juratorum*, or other writ or order in that behalf made or provided, &c.; and this the said, &c., is ready to verify, &c. Whereupon he prayeth judgment, and that the said panel may be quashed."

Mr. *West*, Q. C., for the plaintiff, replied (*ore tenus*, by consent, it being agreed that the pleadings might be afterwards formally put in), that there was another *distringas* lodged with the sheriff, and that the jurors were summoned thereon six days, &c., and that these jurors were the same jurors named in the *distringas* lodged in this case, and were in attendance ready to be sworn.

Mr. *Macdonagh* demurred to this replication, and, in support of the demurrer, read the defendant's plea, by which it appeared that not a juror had been summoned for this individual case. He then laid down what was the old practice respecting summoning jurors previous to the late Jury Act, the 3 & 4 W. 4, c. 91, and shewed that each of the jurors should be summoned six days at least before the day on which he is to attend, by the 18th section. If this enactment be not complied with, it is the default of the plaintiff, not of the sheriff. Now, can it be held (with reference to antecedent sections), that this positive enactment can be disregarded, if a solitary *distringas* reach the sheriff? The *venire* is the first process; it does not contain a clause of *Nisi Prius*. The first process in which it appears is the *distringas juratores*. There were two decisions in Ireland bearing on this question, one on the North East Circuit, *Gillespie v. Cuming* (a); the challenge included the negation of any *distringas*. The other, *Waters v. Hughes* (b), omitted the words in the challenge, "or on any jury on any cause in the said Court of *Nisi Prius* at the said Assizes." That case, which was at the Sittings in the Exchequer after last Term, went a step far-

(a) *Ante*, p. 28.(b) *See post*.

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ther than *Gillespie v. Cuming*, and in both cases the challenge was allowed. There was a recent case in England, *Rogers v. Smith* (a), upon a writ of error. The error assigned was, that the *distringas* was not, at the return thereof, or on any other day or time whatsoever, returned by the sheriff of, &c., nor was there any panel of the names, &c., returned, &c., annexed thereto; and the error was held well assigned. In the case here, any return by the sheriff would be a false one, and shall no return, as in *Rogers v. Smith*, be held bad, and a false one good? But here, in fact, the sheriff could not return, and he has not summoned a single man to attend on this jury. The not doing so has been deemed error, and not amended by 18 *Eliz.* c. 14, *Bacon's Ab. tit. Amendment, B. (b)*. The want of a return upon a *venire facias*, *habeas corpora*, or *distringas*, is cured after verdict, by the 21 *Jac.* 1, "so as a panel of the names of jurors be returned and annexed to the "said writ," but here there is no panel. In *Rogers v. Smith*, the Chief Justice gave judgment, and said that the 18 *Eliz.* c. 14, relates to writs of mesne process, not to jury process; and also that the statute of *James* does not cure the want of a *distringas*, unless there be a panel; and in that case, as in this, there was none. *Holdsworth v. Proctor* (c), and *Crowder v. Rooke* (d), are two very strong cases; and *Charleton v. Burfitt* (e) was a case in England upon the same statute. There, a neglect in the plaintiff to send the jury process in time to the sheriff, was held to put him out of Court. Would it occur to your Lordship that you could fine a single juror here? They were not summoned for this case, and are therefore discharged. In *Gillespie v. Cuming*, Baron PENNEFATHER expressly avoided giving an opinion on this point, although he entered fully on the act of parliament; and in the other case in the Exchequer, other *distringasses* had been delivered. But I think this point was not raised, therefore I cannot cite it for me, but certainly it is not against me. It is now for the first time before the Court.—[Reads note, p. 798 *Chitty's General Practice*, vol. 3, containing the form of writs, &c.]—The writ in this Court, similar to the *distringas*, is called *habeas corpora juratorum*.—[CHIEF JUSTICE. Does it not strike you, that there is a great difference made from the old law, by the very act of parliament you are citing?—In no way did it alter the strict regularity of the proceedings.—[CHIEF JUSTICE. If there be one hundred cases for trial, you would say that there must be one hundred summonses to each juror.]—I think the statute says so. If one would do for all, it would supersede the sheriff's duty, and be a gross fraud on suitors, who are obliged to pay large fees. He would

(a) 1 Adol. & El. 772.

(f) Vol. 1, 7 ed. p. 197.

(c) Cro. Jac. 188.

(d) 2 Wil. 144.

(e) 1 M. & S. 450.

then have but to summon a jury for the case between A. B. and C. D., and they must do for every case—[reads writ]. The writ would be a useless expense, and the statute have gone farther than it need.

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Mr. *J. B. West*, Q. C., *contra*.—I was not prepared for this, but, I think, I recollect enough to satisfy your Lordship that the challenge must be overruled; it does not touch the case. The first case I will dispose of is *Charlton v. Burfitt* (a); there the party failed entirely, because he did not cause the *distringas* to be issued in time to enable the sheriff to summon the jurors. The next is *Crowder v. Rooke* (b), in which the record of *nisi prius*, *habeas corpora*, and *jurata*, were all made up for trial at a certain Sitting; but the cause not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record for a future day of Sitting, but not having done so, and a trial being had at a future day, it was held to have been *coram non judice*. *Buckle v. Scarth* (c), is the next case: no return appeared upon the *habeas corpora*, so that it was "*album brevis*," and the omission was held to be error. In *Beck-naz v. Rye* (d), there was no return to the *venire or distringas*, and a judgment, which had been obtained, was thereupon stayed. The last case in Mr. *Macdonagh's* books is *Holdsworth v. Proctor* (e); the sheriff's name was omitted on the *distringas*, and it was held not amendable. It comes to the short point that there was no *distringas* at all. Now, the cases more near the principal one are *Gillespie v. Cumming*, which was precisely on the same point; and although the fact was that not a *distringas* had been delivered in time, the able counsel who were concerned had to consider how to take advantage of the defect, for they did not think it sufficient to aver that the *distringas* was not in time in that individual case; but, as is laid down in *Stewart's Forms*, p. 1592, that not one *distringas* had been delivered in time in any one case, believing that if it had, it would be good for all. That case came before the Exchequer, on a motion, the Court from which the record went. The judgment was confirmed that the challenge was good, Baron PENNEFATHER saying, "I am aware that, in practice, it frequently happens that *distringases* are delivered to the sheriff but a very short time before the Assizes; but then, in such cases, some one *distringas* having been delivered in time, the sheriff acts upon it, and summons the entire panel; he summons them to attend the Assizes generally, the act of parliament enacting that the same panel shall try all the issues at the same Assizes. There is, therefore, in such cases, a regular summons of the entire panel, and the jurors are summoned for every case." The other case is *Waters v. Hughes*. Mr. *Macdonagh* has

(a) 1 M. &amp; S. 450.

(c) 1 Rolle's Rep. 295.

(e) Cro. Jac. 188.

(b) 2 Wil. 144.

(d) Cro. Eliz. 587.

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already stated what the challenge was. The CHIEF BARON, before whom the case came, went into Chamber where two of the Barons (PENNEFATHER and RICHARDS) were, to consult with them as to what he should do. He came back, saying, that the challenge must be allowed, but offering the plaintiff an issue to try whether any one jury had been summoned in time, presuming that if a jury had been summoned in time under any one *distringas*, it would be good for all. By the 12th section of the act, the sheriff is bound to return the same names in the panel annexed to every *venire facias*, for all the issues at each Assizes or Sessions; and in the conclusion of the 18th section, it does not direct that he shall summon each juror for each case, which might oblige him needlessly to send 3600, or an infinite number of summonses.

DOHERTY, C. J.

I will hear you Mr. *Murphy* in reply, if you wish, but the difficulty is to meet that last case, which I take to be a decision of the full Court of Exchequer. I have no hesitation in overruling the challenge; indeed I feel bound by that decision, even if I had more diffidence than I have in myself.

Challenge overruled.

## EXCHEQUER OF PLEAS.

*Monday, the 4th, Wednesday, the 6th, and Tuesday, the 12th Nov. 1839.*

**TITHE COMPOSITION—2 & 3 W. 4, c. 119—EVIDENCE—  
ASSIGNMENT—SURRENDER.**

**Lord SHANNON v. STOUGHTON.**

THIS was an action of debt for the recovery of tithe composition, claimed by the plaintiff as lay impropriator of a parish called Kilpatrick, in the county of Cork. The declaration contained seven counts, charging the defendant as occupier and as owner of the first interest greater than a tenancy from year to year. *Plea—Nil debet.*

At the trial, which took place before Mr. Sergeant *Greene*, at the Spring Assizes for the county of Cork, in 1838, the plaintiff gave in evidence the certificate and applotment made by a Commissioner appointed under the 2 & 3 W. 4, c. 119, and proved the hand-writing of the Commissioner thereto, and his having acted in that capacity. Plaintiff also proved some proceedings before the Privy Council, confirming the certificate on appeal. Plaintiff's counsel having stated that the lands of Gurtagrennan, on which an annual sum of £28. 11s. 11½d. had been applotted, were those for which it was sought to charge the defendant, produced, as a witness, Henry Supple, who stated that "he was agent to the defendant, and managed his Cork property; that the lands of Gurtagrennan were the property of the defendant, and were in the parish of Kilpatrick, and that some part of the said lands were in lease within the last year. It was all in lease in September then last (1837). The lease of the demesne was surrendered in September, 1837. Mr. Shea's lands were in lease, but the place was given up in last September (1837). Witness, as agent to the defendant, received the rents of all the lands not in the defendant's possession. Sir Robert Travers got a lease of the entire of Gurtagrennan from the defendant twelve years ago, and Shea got an assignment of the lease from him, and held under it until last September. Sir Robert Travers is dead. That lease was a lease of the whole of Gurtagrennan. It was for one life or twenty-one years, being the only term the defendant can give in the county of Cork. Gurtagrennan remained unlet until the 25th of March last (1838). There is no lease now. Did not know of any lease to Shea or his father in 1834. On the 18th of September last,

The presumption of a defendant's liability to tithe composition, arising from his possession of the lands, is not rebutted by the statement of the plaintiff's witness, the land-agent of the defendant, that there had been an out-standing lease, and that defendant had entered into possession of the land upon a parol surrender, without any instrument in writing, the defendant, under such circumstances, not falling within either of the exceptions contained in the 19th section of the 2 & 3 W. 4, c. 119, being neither tenant from year to year, nor at will, within the meaning of that act.

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"Luke Shea surrendered. Defendant has been in possession of the "house and demesne since. The demesne is about 120 acres." On his cross-examination, this witness stated, "that he never heard of a surrender in writing of the lease which had been made to Sir Robert Travers. What the witness called a surrender was the giving up the "lease and the possession, but there was not any writing whatever."

The next witness, Edmond M'Daniel, proved that he had been a yearly tenant to Mr. Shea of a part of the lands; that the defendant was now his landlord; and that he paid his last September rent to Mr. Supple. Counsel for the defendant having then admitted that all the lands in respect of which the tithe composition was claimed in this action, had been and were, before, and at, and since the time this action was brought, held by persons holding in the same manner as Edmond M'Daniel, plaintiff closed his case.

Counsel for the defendant thereupon required the learned Judge to non-suit the plaintiff, or direct the Jury, if they believed the evidence, to find for the defendant, for the following reasons, amongst others:—Because it appeared in evidence that the first estate or interest in the lands of Gurtagrennan greater than a tenancy from year to year had been and was, before and at the time the action was commenced, and also before and at the time when the tithe composition (for the recovery of which this action was brought) accrued due, vested in the assignee or personal representative of the said Sir Robert Travers, under the lease mentioned in the evidence of the said Henry Supple, and not in the defendant; and that there was not any sufficient evidence that the interest in the term demised by the said lease had been or was surrendered or assigned to the defendant. On the part of the plaintiff, it was insisted, in reply, that the defendant's possession of the said lands, and his receipt of the rents thereout, was sufficient evidence to charge him as the assignee of the term so demised to Sir R. Travers. His Lordship refused to non-suit the plaintiff, or to direct the Jury as required by the defendant's counsel; but declared his opinion, that the possession of the defendant, and his receipt of rent, were sufficient to charge the defendant as assignee of the term.

Counsel for the defendant then offered to go into evidence, to shew that, previous to the composition, the lay rectory was not in the Earl of Shannon, but in the Duke of Devonshire; but this evidence the learned Judge refused to admit, on the authority of *Ashe v. Locke* (a), no conflicting certificate or appeal by any other tithe-owner appearing.

They then offered to prove, that for twenty years preceding the date of the certificate, no tithes had been paid in the parish; and that prior to that period, efforts by legal proceedings, to recover tithe, had been

(a) *Crawf. & Dix*, Ab. N. C. 19; since reported, 1 Jones, 11.

made by the persons under whom the plaintiff claimed, but that the tithes then claimed were withheld by the parishioners, who denied the title of those persons to demand or recover them, and that these proceedings were abandoned; but this evidence the learned Judge refused to receive, on the authority of *Lord Shannon v. Hodder (a)*.

His Lordship charged the Jury, that the defendant's possession of the said lands, as appeared upon the evidence of Henry Supple, was sufficient to establish the defendant's liability for the composition for tithes payable in respect of the lands comprised in the lease, mentioned by Supple in his evidence, and directed the Jury to find a verdict for the plaintiff; upon which, counsel for the defendant insisted that there was evidence to go to the Jury to repel any inference arising from the defendant's possession of the said lands that the interest in the said term was vested by assignment in the defendant; and further, that his Lordship was bound to leave it to the Jury, upon the evidence, to say whether there was, in fact, any such assignment. His Lordship refused to leave this question to the Jury, but told them that, in his opinion, the matters given in evidence on the part of the plaintiff entitled him to a verdict. The Jury accordingly found for the plaintiff for £28. 11s. 3d.

A bill of exceptions having been taken upon all the above objections made by the defendant, the case now came on to be argued; the defendant's counsel declining to argue those points which had been decided by this Court in the cases of *Lord Shannon v. Hodder* and *Ashe v. Locke*, but reserving to themselves the right of relying on them in the Court of Error, in case of an appeal.

Mr. Maley, for the defendant.—By the 34th section of the 4 G. 4, c. 99, the liability for tithe composition was annexed to the occupation of the land; but by the 12th section of the 2 & 3 W. 4, c. 119,\* where

(a) See this case stated in the note, *post*, p. 223.

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\* The 2 & 3 W. 4, c. 119, sec. 12, enacts—  
 "That no person holding or occupying land in Ireland as tenant at will or tenant from year to year, or having any lesser estate or interest therein, shall be liable to the payment of any sum or sums of money accruing due and payable after the first day of November, 1833, on account of any composition for tithes chargeable, or which may become chargeable on such land; and the person who shall have in such land the first estate or interest greater than such tenancy from year to year, shall be and become, for and during the continuance of such estate or interest, liable to the payment of the composition from such first day of November, 1833, and thenceforth from time to time accruing due and payable in respect of such land; and upon the expiration, surrender, forfeiture, or other determination of such first estate or interest greater than a tenancy from year to year as aforesaid, the person having the next estate or interest in such land greater than such estate as aforesaid, shall be and become, for and during the continuance of such estate or interest, liable to the payment of such composition as aforesaid; and so on the liability to the payment of such composition attaching and devolving successively, upon the expiration, forfeiture, or other determination of each and every such previous estate or interest as aforesaid,

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ever the lands are in the occupation of a person holding as tenant from year to year, or at will, the liability is annexed to the ownership of the next greater estate. Now, here there was unquestionably a term for years carved out of the inheritance, and as there was not carved out of this term any other tenancy greater than a tenancy from year to year, the question is, whether the term was vested in the personal representative of Sir Robert Travers, or had been assigned or surrendered to the defendant? But the direct evidence went no farther than to shew a surrender or transfer of the possession, and not any transfer or surrender of the estate; and if the defendant entered by the permission of the person in whom the term was vested, or of any one deriving under that person, he was at most only a tenant from year to year, and consequently not liable. Whether there was any assignment or surrender by deed, was a question of fact, and therefore to be decided by the jury. There was direct evidence given of facts tending to the conclusion that the term demised to Sir R. Travers had been surrendered or assigned to the defendant, but there was no direct evidence given of the surrender or assignment. Then the jury were to supply the want of such direct evidence by an inference. There was, however, evidence which conflicted with that inference, and from which, therefore, the jury might have drawn an inference the very reverse of that which was necessary to sustain the plaintiff's case; and the Judge, instead of leaving the question to the jury, decided it himself; but he did so at the instance and at the peril of the plaintiff. At the trial, the learned Judge stated he was somewhat influenced as to the course he should take, by his recollection of a case in 4 *Term Reports*. The case alluded to was *Derisly v. Custance* (a); but it has no application to the present, as it merely decided that in covenant (which runs with the land), evidence that the defendant is in as heir-at-law, will support a declaration charging him as assignee. If the facts proved were such as the jury *must* have drawn the inference from, the learned Judge was right; but if they were only such as a jury *might* have drawn such an inference from, he was bound

(a) 4 T. R. 75.

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"upon the person having the next such estate or interest for and during the continuance of  
 "thereof, until such liability shall eventually attach and devolve upon the person having  
 "the fee-simple and inheritance of such land, who shall be and remain for ever  
 "subject thereto: provided always, that such transfers of liability shall be without  
 "prejudice to any arrears of composition which may have accrued due at the times of  
 "such transfers respectively, and to all remedies for the recovery of such arrears; and  
 "provided always, that if any such tenant at will or yearly tenant shall continue in  
 "possession after such first day of November, 1833, of such land so liable as aforesaid,  
 "without entering into any new agreement with his landlord, such landlord so becoming  
 "liable shall be entitled to recover from such tenant so continuing in such possession, in  
 "addition to the rent then payable by him, the amount of such composition theretofore  
 "payable by such tenant; the same to be recovered by all the ways and means, and as  
 "if the same were part of and added to said rent, by agreement between such landlord  
 "and tenant originally."

to direct them to find according to their belief. *Doe v. Williams* (a); *Doe d. Fenwick v. Read* (b); *Doe d. Courtail v. Thomas* (c).

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Mr. Leslie and Mr. Reeves for the plaintiff.—It is well established, that in cases of exception to a Judge's charge it is not sufficient for the counsel excepting to complain of every part of the charge, but he is bound at the time to state specifically, and to point out by the exception the mode in which he calls upon the Judge to charge the jury upon that part of the case. *Ball v. Manning* (d), and many other cases establish this position. The question here then upon the exception now argued is simply this; was there, in the language of the exception, evidence in the case to rebut the *prima facie* presumption of liability arising from the possession of the land, and receipt of the rent as appearing on the evidence; and ought the Judge, in the language of the exception, to have left a question to the jury, whether there was or not an actual deed of assignment of these lands executed to the defendant by Shea? It has been endeavored to put this case as if the evidence of Henry Supple alone was to be considered, upon which some little doubt might be raised, from the way in which it is stated in the bill of exceptions. However, the final charge of the learned Judge to which the exceptions are pointed, is founded upon the whole evidence, and the argument of counsel on both sides at the close of the case; from which, and the evidence of Supple and M'Daniel, the admitted facts are, that on the 18th September, 1837, the possession was given up to the defendant; that he received from under-tenants holding from year to year the September rents of all but the demesne lands, and that of the latter he has from the 18th of September continued in the actual possession. Upon this state of facts then, what is the evidence to rebut the *prima facie* presumption arising from them? Admitting that such a lease as that described was proved to have been made twelve years ago by the defendant to Sir Robert Travers, does that alone rebut the *prima facie* evidence here? For what is the nature of such presumption? It does not imply anything as to the species of estate which it presumes to be in the party, but merely that the party who is in the enjoyment is the person liable, until he shews the contrary. The defendant, therefore, was bound to go farther, and to shew in whom that lease was now vested by derivative title, if not in him; otherwise, the mere proof that twelve years ago A. B. had a lease of the lands could not be evidence without more, to rebut the presumption of liability arising from enjoyment of the lands.

But, secondly, even supposing it is proved here, that on the 18th

(a) 6 B. &amp; Cr. 41.

(c) 9 B. &amp; Cr. 288.

(b) 5 B. &amp; Al. 223.

(d) 3 Bligh, N. S. 1.

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September, 1837, there was an out-standing lease, and the plaintiff was bound to shew by the evidence the transfer of the interest to the defendant, it is contended that here there appears a surrender by act and operation of law, within the authority of the cases of *Thomas v. Cash* (a); *Rex v. The Inhabitants of Banbury* (b); *Reeve v. Bird* (c); 1 *Saunders' Reports by Williams*, 236, b, note; *Stone v. Whiting* (d); *Walker v. Richardson* (e); *Gore v. Wright* (f); *Chambers's Landlord and Tenant*, p. 823, 1st ed.

But, thirdly, supposing the evidence not to bring the case within these authorities, there is such *prima facie* evidence here, as in an action for rent would establish the liability of the defendant as assignee of the lease to Travers, and throw upon him the *onus* of rebutting it not merely by negative evidence that there was not an assignment by deed, but by positive evidence which must be within his own knowledge, shewing exactly the title by which he did hold the lands; 2 *Starkie's Law of Evid.* p. 250, *Peake's Evid.* 284, 5th ed.; *Doe v. Williams* (g); *Doe v. Murless* (h). But if this holds with regard to liability generally, the case is peculiarly strong with regard to tithe composition, because under those acts it is to be paid evidently either by the party in possession of the land, where his estate is greater than a tenancy from year to year; or where less, by the person receiving the rents of the yearly tenants, because, he alone is enabled to add the tithe to the rent. Now, it is quite established that in an action for rent brought by an assignee of the reversion, even if the assignment be traversed, it is quite enough for the plaintiff to prove a payment of rent by the defendant; 2 *Starkie's Law of Evid.*, 250; *Peake's Evid.*, 283; *Doe v. Parker*, *ib.* In this case, therefore, it is admitted, that as to the part of the lands in the hands of tenants, the defendant has received, and has the power of receiving for the future, the rent and composition added to it. But, at all events, the decision of all the Judges upon the tithe composition acts, that the *onus* of proving his exemption from liability lies on the party proved to be in possession, establishes the defendant's liability in this case.

*Mr. Lane*, in reply.—The objection to the Judge's charge is his having told the jury that the possession of the defendant, as appearing upon the evidence of *Supple*, was sufficient to establish his liability to the tithe composition as an assignee within the meaning of the statute. Now, the evidence of *Supple* negatives an assignment, and shews that defendant's possession was not as assignee, but as surrenderee, or, at least, leaves it doubtful whether defendant was assignee, or whether he

(a) 2 B. & Al. 119.

(c) 1 Cr. M. & R. 31; S. C. 4 Tyr. 612.

(e) 2 Mees. & Wels. 882.

(g) 6 B. & Cr. 41.

(b) 1 Ad. & Ell. 136.

(d) 2 Stark. N. P. C. 235.

(f) 8 Ad. & Ell. 118.

(h) 6 M. & S. 110.

entered into possession in consequence of the lease having been surrendered, and therefore, the Judge ought to have left the question to the jury, whether the defendant was in possession as assignee or surrenderee, instead of taking upon himself to decide upon the evidence that he was assignee.—[COURT. Would he not be liable in either capacity?—Not to an action of debt; for in case of surrender, the 12th section of the 3 & 4 W. 4, c. 119, makes the person having the next estate personally liable during the continuance of his estate, but does not make him liable for arrears which have accrued previously to the surrender. In this case, a verdict has been taken for the composition up to and for the 1st of November, 1837, and, as assignee, the defendant would have been liable to the composition up to that time; for in that case there would have been a continuance of the estate liable to the payment of the composition, and defendant would be the person having that estate within the meaning of the above section of the statute; but if the estate was surrendered in September, 1837, and not assigned, the defendant would only have been liable for composition from the time of the surrender, and the persons who held under the lease which was thus surrendered, would have been liable for the composition which had accrued due previously to that time, the remedies for recovery of the arrears being preserved against them. It ought, therefore, to have been left to the jury to say whether there had been, in point of fact, a surrender or not; *Doe d. Fenwick v. Read* (a), *Doe d. Courtail v. Thomas* (b); the latter of which cases is very like the present, and distinctly points out the course which ought to have been pursued at the trial.

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PENNEFATHER, B.

In this case, we are of opinion that the plaintiff is entitled to judgment. This is an action of debt for tithe composition, and the plaintiff, in making out his case, produced a witness of the name of Supple, the defendant's agent, who stated that a lease had been granted by the defendant of the lands in question, for a term of one life or twenty-one years, to a person of the name of Shea. Although the evidence of this lease was by *parol* only, yet both parties seem to have consented to its admission, and to have agreed in the fact of there having been such a lease. If that lease were still in existence, and the lessee in possession under it, it would have afforded a bar to the plaintiff's right of action against the present defendant. It further appeared, however, on Mr. Supple's direct examination, that the lease had been surrendered to the defendant; but on his cross-examination, he stated that there was no surrender in writing, but that the defendant had got and was in posses-

(a) 5 B. & Al. 232.

(b) 9 B. & Cr. 288.

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sion of the premises. It was argued on the part of the defendant, that this was no assignment or surrender of the lease, in point of law, by Shea. However that might be, if this had been a transaction with a stranger, and the reversioner had brought an action for the rent reserved by the lease (and we give no opinion as to what would have been the effect of the evidence in that case), we think that, taking into consideration the subject-matter of this action, namely, tithe composition, the evidence is sufficient to establish a liability in the defendant to the payment of that tithe composition.

At common law, tithes were payable by the party in possession of the land, and the tithe composition acts, without altering the liability of the terretenants, merely changed the nature of the thing claimed, converting it from an uncertain into a certain demand. The act of the 2 & 3 W. 4, c. 119, made for the purpose of extending the provisions of the former acts, exonerated, in the 12th section, from the payment of the composition, tenants at will and tenants from year to year. We think that tenants within this exemption are those who are tenants to, or hold under some other person or persons.

This is not the situation of the defendant here. He is in possession, not as tenant at will, or from year to year to Shea, but as claiming his interest, though the transfer of that interest have not been perfected by proof of a regular assignment. He is in possession—by virtue of his possession he is liable to the payment of the tithe composition,—and he is not exempted as a tenant at will or from year to year, within the true meaning of the 2 & 3 W. 4, c. 119, s. 12; and we think that this view is open, from the manner in which the Judge left the case to the jury.

My Brother FOSTER has requested me to state his concurrence in the judgment of the Court,\* and in the grounds on which it is rested. This was the only exception argued before us. There were other exceptions on the part of the defendant, which he has declined to argue; these must, therefore, be necessarily overruled, although we are unable to pronounce any opinion upon the merits of them; and upon the whole, we give judgment for the plaintiff.

RICHARDS, B.

I concur in the judgment of the Court. It is quite true, that under and by virtue of the 2 & 3 W. 4, c. 119, s. 12, commonly called Lord Stanley's Act, all persons holding or occupying land in Ireland, as tenants at will or from year to year, or having any lesser estate or interest therein, were declared to be no longer liable for the tithe composition to the tithe-owner; but those exemptions were expressly confined

\* The learned Baron was presiding at *Nisi Prius*. The CHIEF BARON was absent in consequence of indisposition... *Vide ante* p. 24, note.

to parties holding as tenants from year to year, or at will, or having a lesser estate or interest in the lands. Now, here we find the defendant in possession, and it appears from the evidence that he is neither tenant from year to year nor at will. I care not whether he be assignee or not; we have him, at all events, in possession, and he does not adduce any evidence to shew that he fell within any of the exceptions (if I may be allowed to use that word) contained in Lord Stanley's Act. On the contrary, I think it is shewn that he did not. He is, consequently, in my opinion, liable to the payment of the composition now claimed by the plaintiff.

Had it been necessary to prove strictly an assignment from Shea to the defendant, I shall only say, that I would deem it right to take further time to consider that question; but, as at present advised, I do not deem it necessary to express any opinion upon that point, being satisfied on the short grounds upon which I have already put the case, that the direction of the Judge was right, and that there ought, therefore, to be judgment for the plaintiff.

Exceptions overruled, and judgment for the plaintiff.

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## EXCHEQUER OF PLEAS.

*Trinity Term 1837.*

TITHE COMPOSITION—STATUTE OF LIMITATIONS 3 & 4 W. 4, c. 27.

LORD SHANNON v. HODDER.

This was an action of debt tried before PERRIN, J., at the Cork Spring Assizes, 1836, for the recovery of one year's tithe composition of certain lands of the defendant in the same parish, and the same certificate and decree of the Privy Council as in the preceding case were given in evidence. The plaintiff in addition went into evidence of his title to the tithes, deducing it from a patent granted by Chas. 1st to the first Earl of Cork, as to which several questions were raised. The defendant upon the trial produced old witnesses

to prove that no tithe had been paid in the parish within their recollection; and it was ultimately agreed by counsel on both sides to admit, that for twenty years next before the composition, no tithe had been paid out of those lands, nor composition since. The learned Judge having been called on to charge the Jury that the plaintiff was barred by the 3 & 4 W. 4, c. 27, s. 2,\* it was agreed that all questions in the case should be reserved for the opinion of the Court above, the jury signing the issue-paper, and a verdict to be taken for a

*Semble.*—The 3 & 4, W. 4, c. 27, s. 2, does not apply to claims for tithe composition as between the tithe claimant and the owner of the land, but only to *estates* in tithe.

Construction of the 15th section.

\* 3 & 4 W. 4, c. 27, s. 2,—“And be it further enacted, that after the 31st day of December, 1833, no person shall make an entry or distress, or bring any action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.”

*Saturday, November 23d.*

## PRACTICE—SETTING ASIDE PROCESS—SERVICE OF WRIT—JURISDICTION.

MAGUIRE v. SCOTT.

Affidavit in support of a motion to set aside the service of a writ, on the ground that it was served in the liberties of the city of L. and not in the county of L. (to the sheriff of which it was directed), or the confines thereof—*Held*, to be defective, in not mentioning the particular place or part of the liberties where the defendant was served, and also in omitting to negative that the defendant had been served with a copy of the writ within the proper jurisdiction.

MR. MACDONAGH, on behalf of the defendant, moved to set aside the copy of the writ which issued in this cause, and all proceedings taken subsequently to the service of the defendant's notice of the 11th of November, inasmuch as the said writ was not served within the county or bailiwick of the sheriff to whom it was directed, or on the confines of his jurisdiction.

The affidavit of the process-server stated, that on the 14th of September, 1839, he personally served the defendant with the writ, by delivering unto him, "on the road at the Cross of Kishyquirk, in the

sum agreed on if the Court were with the plaintiff, if otherwise, a verdict to be entered for the defendant;—either party to be at liberty to put the question on the record so as to take the opinion of the Court of Error.

The case was argued on two successive days in this Court in Trinity Term 1837, before the late C. B. JOY, PENNEFATHER, B., and RICHARDS, B.

For the defendant it was contended, in the first place, that this case was not within the 2 & 3 W. 4, c. 119, inasmuch as no tithe had been paid, agreed for, or adjudged to be paid, for seven years next before the composition. And, secondly, that the plaintiff was barred by the 1st & 2d sections of the 3 and 4 W. 4, c. 27.

For the plaintiff, as to the first point it was replied, that the 5th and 33d secs. of the 2 & 3 W. 4, c. 119, embodied the provision made by the 16th sec. of the 4 G. 4, c. 99. And as to the second point it was replied, that in its

wording the 2d sec. of the 3 & 4 W. 4, c. 27, did not apply to compositions at all; secondly, that supposing it tithe, the act was intended to apply only between adverse owners of *estates* in tithe, and not as between the owner of the tithe and the occupier or owner of the land; and, thirdly, that even supposing that the act did apply to such cases, the plaintiff was within the saving of the 15th section;\* as the withholding of tithe was not an adverse possession of them at common law.

The Majority of the Court intimated their opinion that the act applied only as between adverse owners of *estates* in tithe; but the Court were unanimous in their opinion that if the case did come within the 2d section, it was within the saving of the 15th, as the withholding of tithe by the occupier of the land was not an adverse possession at the time of the passing of the 3 & 4 W. 4, c. 27; and the plaintiff had judgment.

\* *Vide* the 15th sec. *ante* p. 90, note.

"county of Limerick," a true copy thereof, &c. On the 11th of November, the defendant's attorney served the attorney for the plaintiff with a notice, cautioning him against proceeding further in the cause, apprising him of the alleged irregularity in the service of the writ, and offering to produce "an affidavit by the defendant, negating his being served with any other copy of a writ in said cause, if required." The plaintiff's attorney served a notice in reply, stating that unless an appearance were entered for the defendant on the next day, he would enter an appearance for him. An appearance not having been entered by the defendant, a parliamentary appearance was accordingly entered for him.

An affidavit was subsequently made by the defendant, referring to the service of the writ, in the following terms:—"Saith that a copy of a writ issued in this cause, and directed to the sheriff of the county of Limerick, was served on this deponent on or about the 14th day of September last, when deponent was in his car, accompanied by his son, R. Scott, in the liberties of the city of Limerick; and deponent positively saith, at the time of the service of such writ as aforesaid, this deponent was not within the jurisdiction of the sheriff of the county of Limerick, nor was deponent at said time in the county of Limerick, nor on the confines thereof, but was served with the copy of said writ when in the liberties of the city of Limerick, as aforesaid." An affidavit was also made by the defendant's son, corroborating the above statement as to the service of the writ.

Mr. *Orpen* opposed the motion.—The affidavits made by the defendant and his son, in support of this motion, are defective, and do not directly contradict the affidavit of the process-server; first, in not mentioning the particular place or part of the liberties of the city of Limerick in which the defendant alleges he was served; and secondly, in not negating his having been served with any other copy of process in this cause, within the boundaries of the county of Limerick. He merely states, that on or about the 14th he was served within the liberties of the city, but it does not follow that the process-server, on ascertaining his mistake, may not have served another copy within the county of Limerick on the 14th. Both these averments are material, and are contained in the form of affidavit given in *Tidd's Append.* 5 ed. 179.

Mr. *Macdonagh*, in reply.—The form of the affidavit referred to is not inflexible. The real question here is, whether the defendant, at the time he was served, was within the jurisdiction of the sheriff to whom the writ was directed? The cases shew it to be sufficient to negative the service within the proper county, or the confines thereof. Both averments are contained in the present affidavits. The authorities upon this subject are collected, 1 *Stewart's Practice*, 94.

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The affidavit in support of this application ought to have stated the particular place where the defendant alleges he was served, and ought also to have averred that that place was not within the county to the sheriff of which the writ was directed, or within the confines thereof. The only exception, perhaps, in such cases, being where the alleged place of service is at such a distance from the boundaries of the proper county, as to leave no doubt as to the jurisdiction.

The affidavit ought further to have stated that the defendant had not been served with any other copy of the writ within the proper county. That is a proper averment, and one which should always be introduced into affidavits of this description. Here the affidavit states, that on or about the 14th of September, a copy of the writ was served on the defendant in the liberties of the city of Limerick. That may be quite true, but yet, it may be equally true that the process-server having discovered his mistake, may subsequently have served the defendant with another copy of the writ in the county of Limerick; and this has not been negatived by the affidavit. I am not saying that such actually was the case here, but in order to guard against any evasion of the service of process, we must make the rule general in its application, so as to embrace as well those cases in which the parties would not wilfully suppress or misrepresent the facts, as those in which they might be induced to do so. Upon these grounds, therefore, I think the affidavit defective in the respects already mentioned.

RICHARDS, B.

I also think the affidavit defective, in omitting to negative that the defendant was served with any other copy of the writ within the proper jurisdiction. That was especially necessary in the present case, where the affidavit is so loose with respect to the time of service.

I further think, that a party coming in with an application like the present, and endeavoring to take advantage of an error of this kind, ought to have been more precise in framing his affidavit. He should not only have stated that he was served within the liberties of the city of Limerick, but should also have stated *where* he was served. The defendant may have been mistaken as to the extent or boundaries of the liberties; the affidavit ought, therefore, to have mentioned the particular place, and such accords with the form given by *Tidd*.

I am clearly of opinion that the affidavit is defective on the first ground, and I am strongly inclined to think it defective on the second also.

Motion refused, with costs.

*Monday, November 18th.*

PRACTICE—EJECTMENT—AMENDMENT—VERDICT—  
NEW TRIAL.

Lessee of EDMOND HAYES and others v. CASHEN and others.

MR. BENNETT, Q. C., moved that the verdict had in this case, at the last Summer Assizes for the Queen's County, be set aside, and that the plaintiff be at liberty to amend the declaration in ejectment, by altering the day of the demise from the 20th to the 23d day of July, 1838; and that a new trial be had, on the terms of Edmond Hayes, one of the lessors of the plaintiff, paying the costs of the former trial.

This was an ejectment on the title, brought to recover possession of certain lands in the Queen's County. At the trial, the jury, by the direction of the learned Judge who tried the case, found a verdict for the defendants, on the ground that no demand of possession had been proved.

It was stated in an affidavit made in support of the motion, that the possession of the lands had been, in fact, demanded from the defendants on the 23d of July, 1838, by a person who, at the time of the trial, had gone to America, but that it was hoped that satisfactory evidence of such demand could be given upon any new trial that might take place.

It was further stated, that unless a new trial were granted, and the declaration permitted to be amended in the manner required, the right of the lessors of the plaintiff to recover possession of the lands in question might be seriously affected, in case the defendants were to rely on the statute of limitations.

A notice had been served on the defendants' attorney, calling on him to consent to the amendments being made, and offering to pay all costs incurred.

In support of the application, the case of *Hooper v. Mantle* (a), and *Adams on Ejectment* (b), were cited.

Mr. James Plunket and Mr. Bland opposed the motion, as one without precedent. In *Adams on Ejectment*, it is laid down in the passage referred to, that the permission given to plaintiffs to amend their declaration is not to be extended to the injury of defendants. As to the anticipated defence founded on the statute of limitations, the Courts have refused to allow a writ to be amended, on the ground that the

In an ejectment on the title, a verdict for the defendants set aside, and the declaration allowed to be amended, by altering the date of the demise, on payment of the costs incurred.

(a) 13 Price, 136.

(b) 3d ed. p. 277.

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plaintiff would otherwise be barred by the statute of limitations from bringing a fresh action; *Roberts v. Bate* (a).

They further contended, that upon the state of facts disclosed by the certificate of plaintiff's counsel, no amendment should be permitted whereby the defendants would be abridged of any defence they might be enabled to make upon a new trial.

*Per Curiam.*

This is a motion to the discretion of the Court. It appears there is a fair question to be tried between these parties, but that the trial of that question has been prevented by a fatality. The only effect of the amendments will be, to place the parties in the same situation in which they would have been, had the merits of the case been tried at the last Assizes. The defendants will be deprived of no defence which they might have had on the last trial; and we are of opinion, that under the circumstances, they ought not now to be at liberty to rely on any defence which they would not have been in a position to have relied on then.

Amendments of this kind have frequently been allowed in ejectments as well as in other actions. As the defendants were offered all the costs incurred by them before the notice of the present application was served, as the terms of the proposed amendments, we think there should be no costs of this motion.

It is ordered by the Court, that the motion be granted as desired, and the verdict obtained by defendants set aside on payment of costs; and defendants William Cashen, &c. to be at liberty to confine their defences as they may be advised, without prejudice to the rule to consolidate their defences in this cause. No costs of the motion.\*

(a) 6 Ad. & Ell. 778.

\* See *Lessee Frankfort v. Wilett, Crawford & Dix*, Ab. N. C. 78; see, also, *Langfield's Law of Ejectment*, p. 99.

*Monday, November 25th.*PRACTICE—AMENDMENT—ASSIGNMENT OF ERRORS  
DEMURRER—MARRIED WOMAN—JUDGMENT—BOND  
AND WARRANT OF ATTORNEY.

CHARLES PACKENHAM RODDY v. ELIZA CLEMENTS.

MR. COLLINS, Q. C., with whom was Mr. *Fitzgibbon*, on behalf of the plaintiffs in error, moved that they might be at liberty to amend the assignment of errors filed in the proper office, upon condition of paying the costs.

This was a writ of error *coram vobis*, brought in the names of Henry Clements, and Eliza Clements his wife, upon a judgment in this Court against the said Eliza Clements. The facts disclosed by the several orders and proceedings referred to in the course of the motion were as follows :

On the 6th of April, 1832, Mrs. Clements and Mr. D. Tobyn, her attorney, executed their joint and several bond, with warrant of attorney for confessing judgment thereon, in the penal sum of £300, to secure a sum of £150 advanced by Mr. Roddy, the defendant in error. In the bond, Mrs. Clements was described as "Eliza Clements, wife of "H. Clements, Esq., Major, &c., but by law separated from her husband."

Judgment was entered on the bond; and, in 1836, Mrs. Clements having obtained a decree for the recovery of an annuity, her own separate property, sold it for a considerable sum.


Roddy, having been refused payment of the money secured by the bond, in November, 1837, issued a foreign attachment from the Recorder's Court in the city of Dublin, and attached the price of the annuity in the hands of the purchaser.

In March, 1838, an attempt was made, on the part of Mrs. Clements, the defendant in the Recorder's Court, to set aside the proceedings there, upon the ground of her coverture, but the application was refused, with costs. She then gave bail and pleaded to the action, and Roddy, the plaintiff in that Court, demurred to the plea and had judgment. Leave having been given to amend, a fresh plea was filed, to which the plaintiff again demurred. The defendant, having obtained time to consider as to the propriety of joining in demurrer in the inferior Court, applied to this Court on the 28th January, 1839, to set aside the judgment which had been entered on the bond, on the ground that at the time she executed the bond and warrant of attorney, she was a married woman, and her husband still alive.

In support of that application, an affidavit was made by Mrs. Clements, stating that previously to the time of executing the bond and warrant, Tobyn had been acting as attorney both for Roddy and herself; and that Tobyn having become embarrassed, Roddy had lent the £150 to him, and that they or one of them had requested her to join

The Court will not allow a plaintiff in error to amend his assignment of errors after special demurrer, where the amendment does not tend to the furtherance of justice.

Motion to set aside a judgment entered on a bond and warrant of attorney executed by a married woman refused under the circumstances of the case, the application not having been made in proper time, and the conduct of the applicant not having been such as to entitle her to relief upon motion.

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in the bond by way of security. The affidavit further charged that Roddy, at the time the bond was executed by Mrs. Clements, well knew that she was a married woman, and that her husband was living.

On the other hand, Roddy, by his affidavit, positively denied that he had lent the money to Tobyn, and stated, that at the time of the execution of the bond, Tobyn had represented the said Eliza Clements as a person of respectability, but in embarrassed circumstances, in consequence of not having been able to get into the receipt of her income; that he (Roddy) was induced to lend her the sum of £150, on her solemn assurance of re-payment immediately on getting her money out of this Court, in which, as she alleged, she had filed a bill for a receiver over certain estates whereon an annuity was charged for her sole and separate use. The affidavit stated that it was upon these representations, and for the purpose of enabling her to carry on the proceedings for the recovery of her said annuity, that the deponent had been induced to lend her the sum in question. Mr. Roddy, by his affidavit, further charged, that having, after the sale of the annuity in 1836, applied for payment of the money due to him, he was informed by Tobyn that he was an insolvent, and Mrs. Clements, his co-obligor, a married woman.\*

The Court having refused this motion, the present writ of error (*coram vobis*) was brought on the 1st of February, 1839, and on the 15th of April following, the assignments of error were filed. Meanwhile, as there had been no joinder in demurrer in the Court below, the plaintiff there was entitled to judgment; but the defendant's attorney cautioned the Officer of that Court against permitting any steps to be taken.

On the 29th of May, 1839, an application was made by the defendant in error to this Court, that bail should be given by the plaintiffs in error to prosecute the said writ of error, or that the defendant in error should be at liberty to issue execution forthwith.

The motion was grounded on an allegation that the writ of error had been brought solely for the purpose of delay, and in contempt of the order of the 28th of January, 1839. It was further alleged that the name of the husband had been used without his sanction or permission.

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\* In support of the application to set aside the judgment, was cited the case of *Faithorne v. Blaquire*, 6 M. & Sel. 73; against it, *Maclean v. Douglas*, 3 B. & P. 128; *Luden v. Justice*, 8 Moore, 346; *Anonymous*, 1 Salk. 400; *Simon v. Winnington*, 1 Dowl. Pr. C. 16; *Moses v. Richardson*, 8 B. & Cr. 429.

The COURT were of opinion that, under the circumstances, and considering the length of time which had been allowed to elapse before the application was made, this was not a case calling for their special interference. They therefore refused the motion, but without costs.

On that motion the Court made no rule, but without prejudice to the defendant in error taking such proceedings in the Recorder's Court as he might be advised.

† He accordingly marked judgment in the Recorder's Court, and after a return to a writ of *ca. sa.* against the principal, issued a *scire facias* against the bail, and obtained judgment thereon. He at the same time took concurrent steps in this Court, and on the 5th June, 1839, demurred to the defendant's assignment of errors.\*

No further step was taken on the part of the plaintiffs in error until the 3d of October following, when a writ of error was lodged with the Recorder on the judgment against the bail. The present application was to amend the assignment of errors filed in this Court.

Mr. *Macdonagh*, with whom was Mr. *Palmer, contra.*—It appears from various cases, that writs of error are not amendable at common law.†

Those determinations of the Judges originated in this—they were writs to reverse judgments, and the statutes of amendments extend only to the amendment of writs which support judgments. This total impossibility of amendment created, in fair cases, an occasional mischief through the misprision of the clerks. This was no fault in the suitors, and accordingly the statutes of the 6 *Geo.* 1, c. 6, s. 1, Irish, and 5 *Geo.* 1, c. 13, English, were passed, to cure those misprisings of the clerks of the Court. But the jurisdiction given was limited to amending variances from the original record, or other defects in the writ of error itself; *Gardiner v. Merrott* (a); *Masters v. Ruck* (b).—[PENNEFATHER, B. This is not an application to amend the writ of error, but the assignment of errors, and, therefore, stands upon a different ground.]—Although no direct authority can be found in the books to that effect, with the exception, perhaps, of what is said in a case in *Fitzgibbon's Reports* (c),

(a) 2 Lord Raym. 1587; S. C., 2 Str. 902.

(b) Barnes, 12.

(c) *Marrett v. Gardiner*, p. 268.

† See *Thompson v. Crocker*, 1 Salk. 49; S. C., *nomine Tomkin v. Crocker*, 1 Lord Raym. 564. See also *Waller v. Stoker*, 1 Lord Raym. 71; S. C., 5 Mod. by Leach, 16, 69; and cases *ibid.*

\* The special causes of demurrer assigned were, that although the writ of error purported to be of error in fact, yet that the assignment of errors contained an assignment of error in law; and secondly, that there was an assignment of several errors in fact.

It may be observed, that the plaintiff can assign several er-

rors in law, but only one error in fact; *Fitzherb. Nat. Brev.* 20; and he cannot assign error in fact and in law together, for these are distinct things, and require different trials; *Burdett v. Wheatley*, 2 Ld. Raym. 883; *Jeffrey v. Wood*, 1 Str. 439; 2 Bac. Abr. 217; *Davie v. Franklin*, 2 Tidd, 1169, 9th ed.

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it may be conceded that the Courts have a discretionary power to amend the assignments of error, which being the act of the parties, are in this respect like any other pleadings; yet, admitting that amendments in such cases are within the discretion of the Court, this is not a case in which they ought to be allowed, as the party who is the real plaintiff in error is not entitled to any favor or indulgence from the Court. They refused to interpose summarily on her behalf, or to grant her the relief she sought by the motion of the 28th January; and on the other hand, granted the defendant in error a portion of the relief he sought by his motion of the 29th May, as they permitted him to proceed in the inferior Court, expressly stating that their object was to facilitate his proceedings there.

Writs of error brought for delay (as this manifestly is), are analogous to writs of right brought for the same purpose, and which always have been discouraged by the Courts, who have refused to allow them to be amended; *Worsley v. Blunt* (a).—[PENNEFATHER, B. Yes, writs of right have always been discouraged by the Courts; and it may be fairly contended, that a writ of error brought for delay is almost as exceptionable a proceeding as a writ of right brought for the same purpose.]—Although a demurrer was filed to the assignment of errors on the 5th June, in Trinity Term, yet the plaintiffs in error took no step during the residue of that Term, but finding that their assignment of errors could not in law be sustained, they now on the last day of this (Michaelmas) Term, seek to amend. However, before they did this, they took care to frustrate, or, at least, delay the judgment against the bail in the inferior Court, by lodging a writ of error on that judgment: and now, after two years' ruinous litigation, in which they have been defeated at every step, they admit their pleading to be bad in law, and seek to amend, as if they were a meritorious party.

Mr. *Collins* in reply.—This is a special demurrer, and the very reason for demurring specially is, to enable the opposite party to amend.\* The Court refused to interpose summarily for the relief of this lady on the former occasion, inasmuch as she had her writ of error.

(a) 9 Bingham 635; S. C. 2 M. & Scott, 799; 1 Dowl. Pr. 728. And see *Charlwood v. Morgan*, 1 New. Rep. 64.

\* See acc. *Carter v. Plunkett*, 1 Huds. & Bro. 205; *Savage v. Usher*, Batty, 640; *Brazier v. Jones* 6 B. & Cr. 196; 1 Chitty on Pleadings, 706-7, 5th ed.; and 2 Tidd, 766. See *vide* the case of *Matthews v. Swift*, 1 Hodges, 175, in which the Court refused to allow

a plaintiff to amend his declaration after a special demurrer, where the amendment would not tend to the furtherance of justice. See also *Rankin v. Marsh*, 8 T. R. 30, and the cases cited in the note to the next page.

PENNEFATHER, B.\*—We think this motion ought to be refused. It is an application to the discretion of the Court, and considering the litigation and delay which have taken place we think we ought not to grant it.

It has been said that the Court refused the former motion made on behalf of Mrs. Clements, because she might have had a writ of error;—but that was not the ground on which the motion was refused. It was refused upon the special circumstances of the case, the Court considering that this lady had not acted in a manner that called for its interference on her behalf. The same reasons that operated on our minds then, and induced us to refuse that application, operate on our minds now, and induce us to refuse this. Besides, we find that there has since been a continuation of the same course of expensive and vexatious litigation, independently of the delay which has taken place in bringing forward this motion.

Supposing the Court to have jurisdiction in the present case, and assuming it to have a discretionary power to amend (as it was intimated early in the argument that it had), it is to be guided by the exercise of a sound discretion in each particular case; and under the circumstances of this case, we are of opinion, that the discretionary power of the Court ought not to be called into action. Such amendments ought only to be permitted where they tend to the furtherance of justice, and not where they may be made instrumental in promoting injustice.†

We desire it to be distinctly understood, that we refuse this motion not because we have no power to grant it, but because we are of opinion that the soundest exercise of our discretion will be to refuse permission to amend in the present case.

Motion refused with costs.

\* *Vide ante*, p. 24, note.

† The principles by which the Courts are governed in the exercise of their discretion in matters of amendment, are laid down in similar terms by Lord Hardwicke in *R. v. Ellames*, Rep. temp. Hardw. 42, and by Lord Kenyon in the case of *The King v. The Mayor and Burgesses of Gram-pound*, 7 T. R. 699.

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Bank, when suing, must be represented in the same manner as when sued. Could an action against four of the public officers be sustained? It cannot be contended that it could. So also in indictments, the property is to be laid in *one* of the public officers, and the offence stated to have been committed against or with intent to injure such one officer. There is a corresponding provision in the English act of the 7 G. 4, c. 73; and the Reports abound in cases of actions brought by English Provincial Banks, in all of which *one* of the public officers only was made the nominal plaintiff. The policy of the act, which was to prevent multiplicity of parties, supports the construction contended for by the defendant here. Besides, there is no advantage in joining several persons as plaintiffs, as the act provides against the abatement of the suit by the death, resignation, or removal of the sole nominal plaintiff (a).

The statute is to be construed strictly; *Guthrie v. Fisk* (b). In that case Bailey, J., in construing a similar clause says, "Unless we see very clearly that the meaning of the legislature goes beyond the words of the statute we cannot do so. It is a dangerous rule of construction to introduce words not expressed, because they may be supposed to be within the meaning contemplated." Here the policy of the act is against the construction sought to be given to it by the plaintiff. The act allows a company to be represented on the record by an individual not by a body. The words are "one," and not "one or more." It is not necessary to justify the legislature by shewing why the words "or more" were omitted.

If several may sue, the bank may deprive a defendant of his only witnesses by making them nominal plaintiffs; *Fenn v. Granger* (c). And there is no clause in the act saving their competency. A judgment obtained by the defendant against several public officers could not be enforced against members of the co-partnership not parties to the record; nor could it be enforced under the 17th & 18th sections,\* not being a judgment against a "public officer." Again, a warrant to enter judgment against members resident in England could not be executed under the act.† The principles applicable to the construction of statutes which introduce a new form or course of proceeding are laid

(a) *Vide* the 10th & 17th sections.

(b) 3 B. & Cr. 178.

(c) 3 Camp. 178; and see 1 *Phil. on Evid.* 72, 5th ed.

\* The 17th section enacts, that judgments recovered against "any public officer of any such society or co-partnership" shall operate against the society or co-partnership itself.—And the 18th section enacts, that execution upon any judgment obtained against any such public officer, may be issued against any member of the society or co-partnership.

† The 12th section enacts that "It shall and may be lawful for any person or persons obtaining a judgment in any of His Majesty's Courts of Record in Dublin,

down in *Stradling v. Morgan* (a); *Slade v. Drake* (b); *Vin. Ab. Statutes*, E. 6, Pl. 18; *Townsend's Case* (c); *Com. Dig. Parl. R.* 25; from which it appears that a strained construction is not to be given to the words of the act. If it be said that the defendant is not prejudiced by this mode of proceeding—that furnishes no answer to the objection now relied on. If the defendant be not prejudiced, the plaintiff is not benefited, therefore, the departure from the statute is wanton and gratuitous. The doctrine of surplusage never extended to striking parties off the record, or, to cases where the superfluous matter was not exactly defined. Here three out of four plaintiffs are superfluous—but which three?—The Court cannot select:—The defendant could not enter up judgment against one. If the doctrine of surplusage be applied here, it may equally be applied to any case in which too many plaintiffs are joined;—for instance, to the case of a wife joined as co-plaintiff with her husband, where he should have sued alone. Where one sued on behalf of a joint stock company instead of two as directed by the trust deed, the plaintiff was non suited; *Davies v. Hawkins* (d). Again, if any of the plaintiffs were struck out of the declaration, it would not correspond with the process, and, therefore, would be irregular. The more convenient course will be to adhere to the words of the statute.

Mr. Napier and Mr. Whiteside, *contra*.—This act was intended for the benefit of the company, which has always sued in the names of its directors, who are the plaintiffs here. Although many actions have been brought by the company in the names of these four persons, this is the first case in which any objection has been taken upon that ground. The public officers are required by the 6th section of the statute to be members of the company. The authority to sue as public officer is coupled with an interest. It is not possible to suggest any mischief that can arise from suing in the names of more than one; *Skinner v.*

(a) Pl. Com. 206, b.

(b) Hob. 298.

(c) Pl. Com. 113; *et vide* Vin. Ab. Statute, E. 6, Pl. 16.

(d) 3 M. &amp; S. 488.

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against any such public officer for the time being of any such society or copartnership; and such person or persons is and are hereby empowered, by warrant under hand and seal, reciting the effect of such judgment, to authorise any attorney or attornies in Great Britain to appear for such public officer in an action of debt to be brought in any Court of Record in Great Britain against such public officer, at the suit of the person or persons obtaining such judgment in Ireland, and thereupon to confess judgment forthwith in such action for a sum equal to the sum for which judgment shall have been so obtained in Ireland, together with the costs of such proceeding; and such Judgment shall be thereupon entered up of record in the said Court in Great Britain against such public officer, and shall have the like effect in Great Britain against the members of such society or copartnership as the original judgment so obtained in Ireland.

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*Stocks* (a), is a case in principle like the present. If the defendant required the evidence of any of these public officers he might apply to the Court to strike his name out of the declaration. *Keily v. Whitaker* (b), shews that this is a remedial act, and should receive a liberal construction. *Townsend v. Walley* (c), is a case in point, as to the words of the statutable power being satisfied by the suit in the name of more than one. The *Duke of Buckingham's case* (d); *Hoe's case* (e), and *Guthrie v. Armstrong* (f), also recognise the same rule of construction. These were cases of powers, which must always be construed strictly. The act of parliament contemplates the existence of several public officers; the 10th section is conclusive of the question here. That section implies that the company need not sue in the name of one public officer only. An effect is not to be given to the letter of an enactment which would be inconsistent with the object of the statute; *The King v. Inhabitants of Everdon* (g); *Pentland v. Hervieu* (h).

Mr. *Holmes*, in reply.—No case grounded upon the principle governing acts of parliament made for the public benefit, will apply to the present case. This act was passed for the private benefit of the company and they are like any other company. When they sue under the authority of the act they must pursue its directions. The statutable privilege 'given them' is, to sue in the name of *one* public officer. *Heath v. Hubbard* (i), shews the distinction between the construction of statutes where they respect public officers, and where they respect officers not public. Here the act is to be done by the parties themselves, and they must strictly adhere to the privilege conferred upon them. The Court is not called upon to be liberal in its construction of this statute to benefit the public, but to cure the party's own blunder.—There is a similar act in England, yet no case can be shewn where more than one public officer sued as plaintiff; *Rainsford v. Copeland* (k). *Guthrie v. Armstrong*, relied upon at the other side, is an authority against them, the power in that case was given to the three or any of them. If a new power be given by an affirmative statute to certain persons, all other persons are excluded; *Bac. Ab. Statute; Foster's Case* (l); 3 *Vin. Ab. Authority, B. Pl. 7*.—[PENNEFATHER, B.—The part of the statute referring to criminal proceedings is material to be ended to; at common law you must lay the property as the property

(a) 4 B. & Ald. 437.

(c) Moore, p. 341, Plac. 463.

(e) 5 Rep. 90.

(g) 9 East, 107.

(i, 4 East, 110.

(b) 1 Ir. Law Rep. 34.

(d) 1 Sid. 101.

(f) 1 D. & R. 248.

(h) 2 Huds. & Br. 443.

(k) 6 Ad. & Ellis, 482.

(l) 11 Co. Rep. 64.

of all the owners; the statute says you may lay it as the property of *one* public officer, but that is not equivalent to saying it may be laid as the property of *four*. If the co-partners were thus sued, might they not object?—Yes. The company have no power at all to sue or be sued by public officer except under the statute. An indictment laying the property in the plaintiffs here would be bad. The case of *The Churchwardens* does not apply, they are a corporation, and the act of *Eliz.* was passed for a general public purpose. Here the Court is called on to correct a defect in the proceedings which the parties themselves should have corrected when pointed out to them by demurrer.

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We were very much disposed to maintain the proceedings in this case, if it were possible to do so. And we give our opinion not quite free from doubt; but we think the authority given by the statute ought to be pursued. The action is directed to be brought in the name of "any one" of the public officers, it is a direction easily followed, and no case has been cited to shew that it has ever been departed from. In a criminal case we should be very much pressed by the clause of the act, which directs the property to be laid in the name of one public officer: on the whole we think it better to abide by the words of the statute, and to allow the demurrer.

Demurrer allowed.

Mr. *Whiteside* applied for liberty to amend, which was granted on payment of costs.

NOTE.—The case of *Holmes v. Binnie*, 6 Scott, 346; S. C. 4, Bing. N. C. 285, was not referred to at either side.

In that case an action having been brought in the names of *two* public officers of a Banking Company, established pursuant to the English act of the 7 Geo. 4, c. 46, the 9th section of that act only authorising the action to be brought in the name of *one*; the Court of Common Pleas, on the application of the plaintiff's counsel, allowed the

proceedings to be amended by striking out the name of one of the plaintiffs, on payment of costs.

In support of the application the case of *Baker v. Neaver*, 1 Dowl. P. C. 616, was cited, where the Court of Exchequer allowed the proceedings at the suit of assignees of a bankrupt to be amended by making the official assignee a joint plaintiff with the other assignees.

Wednesday, January 29th.

PRACTICE—EJECTMENT—AFFIDAVIT OF SERVICE—  
TITLE OF AFFIDAVIT—NOTICE OF MOTION—COSTS.

LOVELAND, Lessee of LYNCH and others, v. the Casual Ejector.

The affidavit of the service of an ejectment must be entitled in strict accordance with the frame of the demises as laid in the declaration.

The Court will not allow the costs of a motion to set aside proceedings, where the notice of motion does not sufficiently specify the defect on which the motion is grounded.

EJECTMENT on the title. The declaration contained seven demises, four of which were single demises, in the names of John Lynch, Mary Lynch, James Lyneh, and Bridget Molony respectively. The fifth was a joint demise in the names of the three first mentioned persons; the sixth a joint demise in the names of all; and the seventh a joint demise in the names of John Lynch, Mary Lynch, and Bridget Molony. In the title of the affidavit of service, the first six demises were stated correctly, but the last demise was omitted altogether. The rule for judgment had been entered.

Mr. John O'Hara, on behalf of T. Lowney, a tenant of the premises in the ejectment mentioned, moved to set aside the proceedings, on the ground of irregularity, "no sufficient affidavit of service of said ejectment having been filed;" and cited *Jack d. Spollen v. Thrustout* (a).

Mr. Athill, *contra*, contended for the sufficiency of the affidavit, as the names of all the lessors of the plaintiff were set forth in the title, which stated the several demises in the names of each; *Doe d. Jenks v. Roe* (b).

PENNEFATHER, B.

The cause in which the affidavit is entitled is not the cause depending in Court, and the person who has made the affidavit could not be convicted of perjury. The lessors of the plaintiff may file another affidavit, vacating the rules which have been entered, but no costs of the motion, the notice not having pointed out the defect in the affidavit (c).

Set aside the rules to plead, without costs.\*

(a) 1 Huds. & Br. 202.

(b) 2 Dowl. P. C. 56.

(c) See *Gordon v. Breaky*, 6 Law Rec. 2d Ser. 269.

\* "The form of the affidavit used in Ireland differs from that in England: in this country, it is entitled according to the frame of the demises in the declaration. Thus—'John Jack, Lessee of A.

'B., C. D., and E. F.; also Lessee of A. B. and C. D.; also Lessee of E. F. (as the demises may be), v. Thrustout, Ejector.'" Longfield's Law of Ejectment, p. 41.

*Saturday, February 8th, and Wednesday, February 12th.*

IN CHAMBER.

*Coram* PENNEFATHER, B.

JUDGMENT—KERRY BOND.

Executor of ADAMS *v.* HOUSTON.\*

MR. DIX applied, on behalf of the executor of the obligee in a Kerry bond, for liberty to enter up judgment against the obligor. The bond bore date the 8th March, 1830, and the executor, in his affidavit, stated that all interest on the bond had been paid up to the 1st of November last, and that he had seen the obligor alive during the last Term (*a*).—[PENNEFATHER, B. A difference of opinion has existed as to whether judgment can be entered on such bonds, except as between the original parties.]—The Court of Queen's Bench has always held that judgment can be entered on such bonds at suit of the executor or administrator of the obligee; *Administrator of White v. White* (*b*). The bond here is in the ordinary form of all Kerry bonds, and the same as that on which the King's Bench allowed judgment to be entered. In the bond, the money is made payable to the obligee, "his executors or administrators," and the warrant, which is incorporated with the bond itself, authorises the confession of "a judgment or judgments for that purpose on a declaration or declarations to be filed for the above penalty." It does not say by whom, but it must mean by the persons previously

This Court will permit judgment to be entered on a Kerry bond at the suit of the executor of the obligee against the obligor.

\* *Ex relatione.*

(*a*) *Vide Executors of Brennan v. Foley*, 1 *Crawf. & Dix*, Ab. N. C. 374.

(*b*) 3 *Law Rec.* 2d Ser. 82.

In England, however, the same particularity is not necessary in the title of the affidavit as in the declaration; it is sufficient to state the names of the lessors, and not the frame of the demises. *Doe d. Bankes v. Roe*, 1 *Murphy & Hurlstone*, 3; 1 *Jurist*, 152; S. C. *nomine Doe d. Barles v. Roe*, 5 *Dowl. P. C.* 447; the Courts holding, that in an affidavit of service so entitled, there is sufficient certainty to support an indictment for perjury. See, also, *Doe d. Jenks v.*

*Roe*, 2 *Dowl. P. C.* 55; S. C. 3 *Tyr.* 602; *Doe v. Roe*, 1 *Jurist*, 844; and *Doe d. Walters v. Roe*, *Id.* 166. But an affidavit entitled "*Doe v. Roe*," omitting the name of the lessor of the plaintiff, is bad; *Doe d. Jones v. Johnson*, *Id.* So where the declaration in ejectment was on several demises, an affidavit of service, entitled, "*Doe d. Cousins v. Roe*" was held insufficient, it being, in fact, a misdescription of the action; *Doe d. Cousins v. Roe*, 7 *Dowl. P. C.* 53.

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named as entitled to the penalty, that is, the conuzee, his executors, or administrators. The late Chief Baron, no doubt, refused an application precisely similar to this in *Executors of Montgomery v. Johnson* (a); and also in *Executors of Bell v. Auchinleck* (b).—[PENNEFATHER, B. It would appear, from the case of *Montgomery v. Johnson*, that the late Chief Baron set his face against such securities altogether, and would not let judgment be entered on the bond at all; I confess I cannot go that length; and my opinion still is, as it always has been, in favor of the view taken by the Queen's Bench; (c) but as there has been a different decision pronounced in this Court, I cannot, sitting alone in Chamber, now grant the application.

By the directions of his Lordship, the application was subsequently renewed in Chamber

*Coram* WOULFE, C. B., PENNEFATHER, B., and RICHARDS, B.

Mr. *Dix* contended that such instruments were at one time very common assurances, and still were common in the northern counties: that it was manifest from the decision of the late Chief Baron, reported in the *5th Law Recorder*, that he would have made the same rule, even if the application had been made between the original parties.—[WOULFE, C. B. In an ordinary warrant, could judgment be entered if the executors were not named?—No; but the wording of the two instruments is quite different.—[PENNEFATHER, B. I certainly think the cases are quite distinguishable.]—According to the rule of the Court, every ordinary warrant must be filed when judgment is entered whilst the party keeps the bond; but in the case of a Kerry bond, where the warrant is incorporated with it, the bond itself must be filed; *Executors of Cinnamon v. M'Quinlan* (d), another case in which the Queen's Bench allowed judgment to be entered on such a bond at the suit of the executors of the obligee.

WOULFE, C. B.

I agree with Baron PENNEFATHER, in thinking that this case is distinguishable from that of an ordinary warrant.

RICHARDS, B.

"A judgment or judgments for that purpose" must mean a judgment

(a) 5 Law Rec. 2d Ser. 71.

(b) 1 Law Rec. 2 Ser. 183.

(c) *Vide* the case of *White v. White*, 3 Law Rec. 2d Ser. 32.

(d) 2 Law Rec. 2d Ser. 120.

r judgments to be entered at the suit of the parties before declared entitled to the penalty, otherwise such instruments as this would be of use.

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Their Lordships desired that the case should be mentioned to Baron FOSTER, as he was reported to have entertained a different opinion in the case of *The Executors of Montgomery v. Johnson*.

The matter was afterwards mentioned before Baron FOSTER, in Chamber, who stated that, according to his recollection, the late Chief Baron discountenanced this species of securities altogether. His Lordship further stated, that he recollected having himself decided that judgment could not be entered on such a bond against the executor of the obligor, but that he thought the present case, where the obligor was still alive, and the application was made at the suit of the executors of the obligee, quite distinguishable.

On a subsequent day, the application was renewed in Chamber before PENEATHER, B., and the

Motion was granted.

Monday, January 20th.

PRACTICE—AFFIDAVIT TO HOLD TO BAIL—CHECK—  
BILL OF EXCHANGE—STAMP.

CLEARY v. RAMSAY.

In this case, a rule to shew cause of bail was obtained by the defendant, who had been arrested and holden to bail upon the following affidavit, which was sworn before a Commissioner in London:—

"Thomas Cleary, of," &c., "in the county of Middlesex," in that part "of the United Kingdom of Great Britain and Ireland called England, Gentleman, maketh oath and saith, that Wm. Ramsay, is justly and truly indebted unto this deponent in the sum of £21. 11s. principal money, due to this deponent as the bearer on demand of a certain check drawn by the said William Ramsay on one Robert Ramsay, of Sligo, in the county of Sligo, in that part of the said United Kingdom of Great

An affidavit to hold to bail, made by the plaintiff, stating that W. R. (the defendant) was indebted to the deponent in, &c., principal money, due to the deponent as the bearer on demand of a certain "check"

drawn by the

said W. R. on one R. R., which "said check" was given to the deponent for value received by the said R. R. in diet, &c. found and provided by the deponent for the said R. R., and at his request, and for money lent and advanced to him, and at his like request, by the deponent, and which "said check" was made payable to deponent on demand, and had been refused payment by the said R. R., to whom it was duly presented for payment—Held not to be sufficient, the instrument therein set forth not being a check, but merely a written direction to R. R. to pay his own debt. Held, also, that it could not be presumed to be a bill of exchange, inasmuch as it was not stated to be stamped.

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"Britain and Ireland called Ireland, and bearing date, London, 7th day of September, 1839; and which said check was given unto this deponent for value received by the said Robert Ramsay in diet, washing and lodging, found and provided by this deponent for the said Robert Ramsay, and at his request; and for money lent and advanced to him, and at his like request, by this deponent; and which said check was made payable to this deponent or bearer on demand, and has been refused payment by the said Robert Ramsay, to whom it was duly presented for payment; and the said sum of £21. 11s. still remains wholly due and unpaid."

*Mr. Fitzgibbon* for the defendant.—On the face of the affidavit it is stated, that the debt is for diet, &c., supplied to *Robert Ramsay*; it does not say at the request of *William Ramsay*, the defendant, but states that *William Ramsay* gave a check on *Robert* for *Robert's* debt. If this be considered as an undertaking to pay the debt of another, there must be a valid agreement in writing under the statute of frauds, with a consideration expressed on the face of it, as decided in *Wain v. Warters* (a), and many subsequent cases.

The cause of action disclosed in the affidavit amounts only to this, that the defendant gave the plaintiff a written order by which he desired *Robert Ramsay* to pay the plaintiff the debt which he, *Robert Ramsay*, owed the plaintiff, but that *Robert Ramsay* refused to do so. Every word of this statement may be true, and yet it discloses no legal cause of action against *William Ramsay*.

*Mr. Crawford, contra.*—The objection to this affidavit is solely founded on a clerical error, the name of *Robert* having been substituted by mistake for that of *William*. The words "at his request" may be fairly taken to mean, at the request of *William Ramsay*, although such may not be the strictly grammatical construction of the sentence. But the statement of the consideration, being surplusage, may be rejected altogether; *Ibbotson v. Andrew* (b); and then this instrument, although it cannot be treated as a check, may be declared on as a bill of exchange payable to bearer on demand.—[PENNEFATHER, B. In *Ibbotson v. Andrew*, the defendant was charged as the acceptor of two bills of exchange, and notwithstanding the rejection of the statement of the consideration in that case, sufficient remained to shew that there was a good cause of action against the defendant. The affidavit there stated a consideration, although imperfectly; but did not disclose the total absence of a consideration as the affidavit does here. Have you any precedent of an affidavit to hold to bail in

(a) 5 East, 10; S. C., 1 Smith, 299.

(b) Alc. &amp; Nap. 189.

which a bill of exchange payable to bearer on demand is described as a check? A check in common parlance and in mercantile language implies a draft without a stamp.]—There may be no precedent of such an affidavit, but upon principle, there is no reason why a bill of exchange should not be so described, and the Court will not presume that this instrument is without a stamp.

*Per Curiam.*

This affidavit is insufficient. The words "at his request," must mean at the request of Robert Ramsay, as *his* must be taken to refer to the last antecedent.

Upon the face of the affidavit it appears that the instrument therein set forth is an invalid instrument, being nothing more than a written direction to Robert Ramsay to pay his own debt, and we cannot presume it to be a bill of exchange, because it is not stated to be stamped.

Disallow the cause of bail and discharge the defendant out of custody.

SITTINGS AFTER HILARY TERM 1840.

### REGISTRY APPEALS.

*Monday, February 24th.*

*Coram THE LORD CHIEF BARON.*

### CERTIFICATE OF FORMER REGISTRY.

*In re PATRICK REILLY.\**

The appellant having in compliance with the 27th section of the 2 & 3 W. 4, c. 88, given notice of his intention to register anew as a £20 freeholder for the county of Dublin, claimed to be entitled and admitted to register his vote upon producing his former certificate, which was in the following form:—

*"Certificate of Rent-charger, Freeholder, or Leaseholder.*

"County } This is to certify that (*Patrick Reilly*) of (*Boat-lane*)  
 of } " was this day duly registered before me as a voter for  
 "Dublin." } " this (*county*), in right of a (*freehold*) of the yearly

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OLEARY  
 &  
 RAMSAY.

On an application to register anew under the 27th section of the 2 & 3 W. 4, c. 88, *He/d*, that a certificate of former registry was valid, although it omitted to state the voter's addition or the county in which he resided.

\* *Ex relatione.*

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"value of (*twenty*) pounds situate at (*Kilbrisk house, Barony of Coolock*) in this county.

"Dated this (20th) day of (*October*), 1832, at (*Kilmainham*)."

"(*Daniel Ryan Kane*) Chairman of Sessions.

"(*W. B. Fitzgerald*) Clerk of the Peace."\*

His claim was rejected upon the ground that the certificate was defective, containing neither the addition of the voter, nor a sufficiently accurate description of his place of abode.

Mr. *Monahan*, Q. C. for the appellant, relied upon the certificate as *prima facie* evidence of his right under the 27th section "to obtain a "new certificate without further proof or oath." If there be any informality in the framing of the instrument, that informality is not attributable to the error or neglect of the claimant, but to that of the Officer of the Court, whose duty in framing and delivering a certificate to each registered voter upon application is fully set forth in the 28th section. That section directs, that "upon any person being under this act declared entitled to be registered as a voter, the Clerk of the Peace or his deputy shall, "upon payment of one shilling, give to the person so declared entitled a "certificate on parchment, signed by such Clerk of the Peace, or his "deputy, as also by the Barrister, Chairman, or Judge, declaring such "right:" and then the section goes on to specify the nature of the Officer's duty more accurately, by requiring him to certify, "that such person "has been registered as a voter for such county, city, town, or borough, "and the character and right in which he has been so registered, and the "date of such registry." All this has been done, but the objection is, that inasmuch as the schedule (D. No. 1) of the act gives a form of certificate which contains the above particulars more minutely set forth and amplified, an omission of any of the particulars so super-added by the schedule is fatal.

The certificate in this case is objected to, inasmuch as it sets forth the name of the voter only, without giving his addition as directed by the schedule, and the name of his abode without specifying in what county, city, town or borough it is situate. But the statute in this respect is merely directory, and the omission of the Officer cannot vitiate the instrument. He is the only person authorised to issue a certificate, and the voter cannot control him in the execution of his duty. That instrument is under an express provision of the statute made *prima facie* evidence of a certain right, and that right accrues from certain qualifi-

\* The above certificate (with the exception of the words in *italics*) was in the usual printed form.

cations being declared to exist in the claimant, upon a due and legal investigation of his case before a competent tribunal.

The certificate is not the record, it is only evidence of an adjudication of the Court below, it is made *prima facie* evidence in that case only by a statutory provision, and it may be controverted by extrinsic evidence adduced by the opposing party. For instance, it is competent to those who dispute the claim to prove the death of the party, the alienation of the lands since the adjudication, and various other facts connected with the merits of the case, but it is not competent to them to strip the appellant of a right conferred upon him by the statute, because the Officer of the Court has omitted to fulfil his duty. That principle was settled in *Henth v. Hubbard* (a), where it was decided that a bill of sale of a ship at sea was valid, notwithstanding the omission of the Officer to endorse the entry of the transfer as directed by 34 Geo. 3, c. 68.

The same principle was acted on by Lord Mansfield in *Underwood v. Miller* (b); and by the Court of Exchequer Chamber in this country, in ——— v. *Maxwell*, cited by BURTON, J., in *Lessee of M'Donnell v. Murphy* (c). A public Officer will be presumed to have done his duty until the contrary appear; *Williams v. The East India Company* (d); *Monke v. Butler* (e).

The fact then of a certificate, no matter how defective, provided it be intelligible, having been uttered by the proper Officer in pursuance of the directory provision of the statute, is evidence that the appellant's case has undergone the due investigation required by law.

In *Breen's Case* (f), it was decided before a committee of the House of Commons that the vote was good, notwithstanding the omission of the Officer to insert the addition of the claimant. And in *Lane's Case* (g), the vote was held good, notwithstanding that the affidavit did not set out the street, lane, or place in which the voter resided, and the case of the affidavit is much stronger than that of the certificate, the latter being purely the act of the Officer.

Mr. Latouche and Mr. Hamilton, *contra*.—The statute has declared that the certificate shall establish a *prima facie* case under the 27th section, but it only recognises such certificates as are duly executed according to the provisions of the act, and the schedule gives a specific form, leaving blanks to be filled up by the Officer, according to the information furnished in each case by the voter himself. This is sufficient

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(a) 4 East, 110.

(c) 2 Fox &amp; Sm. 304, n.

(e) 1 Rol. Rep. 83.

(b) 1 Taunt. 387.

(d) 3 East, 192.

(f) Falk. &amp; Fitz. 322.

(g) Id. 327.

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to distinguish this case from the cases of *Heath v. Hubbard*, and *Underwood v. Miller*. In both those cases, the act was one which the Officer alone was to perform, and which would have been performed without the privity of the parties. In the case of a certificate, the voter, in order to render the Officer liable for a breach of duty, should demand the certificate in person, and then it should be given to himself alone. Thus the act of the Officer is coupled with the act of the voter, and whatever omission or mistake occurs is the omission or mistake of the voter rather than of the Officer. If any misdescription or misnomer appears on the face of the instrument, it must have arisen either from the negligence or fraud of the voter, who was not only present at the time of its execution, but, as appears from the 27th section, must necessarily have been the party who communicated the instructions to the Clerk of the Peace. There are authorities shewing that third parties may be prejudiced by a non-compliance with the provisions of an act of parliament; *Crossley v. Arkwright* (a); *Dolman v. Dolman* (b).

The cases of *Breen* and *Lane*, cited from *Falkner & Fitzherbert's Reports*, although the decisions of a Committee of the House of Commons, are not entitled to the weight of judicial authorities whereby this Court can be coerced.

It is provided by the 54th section, that the certificate shall be conclusive of the right of voting, and no inquiry or scrutiny whatever can be made regarding it during the election; whereas, for the purpose of renewing a registry, the certificate is only treated as affording *prima facie* evidence, which clearly implies a subsequent investigation. The name of the person in the certificate may apply to several persons, and one of the modes of narrowing the inquiry respecting the individual, is to specify his addition and residence; and accordingly the statute directs, in the schedule, that the voter shall be so described in his certificate. The admission of this claim would open a door to the grossest fraud.

WOULFE, C. B.

I do not consider the objection in this case a substantial one. The party produces a certificate which he received pursuant to the provisions of the statute, and which it was imperative on the Officer of the Court, under a heavy penalty, to deliver to him upon payment of one shilling. With the execution of that instrument the party has nothing to do. The statute makes it *prima facie* evidence when produced after a lapse of time, which may extend to the term of eight years. It would clearly be an injustice to the voter, if, after his case having undergone the minute and searching investigation to which it is necessarily exposed

(a) 2 T. R. 603.

(b) 5 T. R. 641.

by the 15th, 16th, 17th, 18th, and 19th sections of the act, before the Barrister could adjudicate upon it, he were liable to be turned round upon a point of form, and without any disqualifying act on his part, to be deprived of the benefit conferred on him by the statute, because the Officer may have been remiss in the execution of his duty. The law is rightly laid down in *Heath v. Hubbard*, that the omission of the Officer shall not prejudice the party. I must take the certificate as affording a good *prima facie* case, and, therefore, admit the claimant.

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Rejection reversed.—Claim admitted.

*Same day.*

REGISTRY—LEASEHOLD—APPORTIONMENT OF RENT—  
BENEFICIAL INTEREST—POWER TO ADJOURN  
REGISTRY SESSIONS.

In re M'KEE.

THIS was an appeal from a decision of the Chairman of the County of Dublin, at a Registry Sessions held at Kingstown.

Appellant having served notice of his intention to register as a £10 leaseholder, pursuant to the 2 & 3 W. 4, c. 88, was rejected by the Chairman, on the grounds, that being a sub-lessee, he could only register out of premises in his own occupation, and that he had not a "beneficial interest therein of £10 over and above all rents and charges payable out of the same." It was however added, that "If the rent is duly apportioned, he has sufficient value to entitle him to register."

A preliminary objection was taken against the appeal,

Mr. *Latouche* contending that the Sessions were illegally held, the time and place being appointed by the Lord Lieutenant, under a supposed power of adjournment said to be contained in the 33d section of the Reform Act; whereas such power only related to the first or Special Sessions held immediately after the passing of that act. The Session for registering is a component part of the Quarter Sessions, as is evident from the 27th section, and there are no Quarter Sessions held at Kingstown. By the 6 and 7 Wm. 4, c. 75, s. 59,

A beneficial interest of £10 per annum remaining after a due apportionment of the rent upon that part of the premises out of which a leaseholder seeks to register his vote—Held to be a sufficient qualification under 2 and 3 W. 4, c. 88, although such interest be not over and above the entire rent to which the premises are legally liable.

Held also, that the power of adjournment conferred upon the Lord Lieutenant by the 33d section of the same act applied to all

future Registry Sessions, as well as to the first Special Session held under the act.

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a power is given to the Lord Lieutenant to appoint certain additional places for holding Quarter Sessions, but subject to certain conditions, the same to be made known and published only at a certain period of the year; and these Sessions were not so published. By the 27th section of the Reform Act, the Barrister is bound to hold his Registry Court no where but at a Quarter Sessions, the business of which is clearly defined by the 36 G. 3, c. 25.

The CHIEF BARON overruled the objection, observing, that even supposing he had a doubt, which he then certainly did not entertain, as to the 33d section having reference to all future Registry Sessions, still it was not competent for the Court to inquire into the validity or invalidity of the act of the executive in such a case, nor into the question of the Chairman's jurisdiction. That was already decided by Mr. Justice CRAMPTON, in *Kennedy's Case (a)*, and that decision he saw no ground for altering. Had the appellant been registered in the Court below in the first instance, there could have been no appeal against his admission, and his vote should so far stand valid and good. If that were the state of things, and there existed no means of removing his name from off the list of voters, had he been admitted by the Court below, it would clearly be injustice to deny him an opportunity of proving that before the Appellate Court, which, if proved to the satisfaction of the Court below, would have conferred a right that could not be impugned, at least until after he had exercised it by voting.

His Lordship refused to reserve the question for the consideration of the Judges, declaring that his opinion was by no means doubtful, and that he could not entertain the objection.

Mr. *Monahan*, Q. C., then stated the appellant's case.—He held a lot of ground for a long term of years, at a rent of £12, but not directly under the owner in fee. He was, therefore, as a sub-lessee, disqualified from registering, except out of that portion in his own occupation. Upon this plot of ground he built three houses, at an expense of £600 or £800. Two of these houses were let by him at a rent of £30 a-year each, and the remaining one, which he occupied, was valued at £20. By deducting the entire £12 rent to which he was subject under his lease, there remained an interest of not more than £8, being £2 short of the franchise. The appellant sought to have the rent apportioned upon the premises, in which case, as stated in the order of rejection, he would be entitled to his vote. The 1st section of the Reform Act confers the right sought for upon all who possessed a "beneficial interest therein" (meaning in the premises which became the subject of registry), over and above "all rent and charges," so far leaving the words "rent and charges" to be interpreted according to the nature of the case. The

(a) Alc. Reg. Cas. 47.

affidavit of the leaseholder, however, helped out the interpretation, if any help were wanting, for it went on, after describing the premises, to say, that it "is now of the clear yearly value of £10 over and above all "rent and charges payable out of the same." There can be no question, then, that the legislature meant that the claimant should have a beneficial interest of £10 over and above all rent and charges to which that portion of the lands out of which he sought to register was separately liable. That view was taken by ten of the Judges in *In re Cunningham and others* (a), where joint tenants after severance were allowed to register, under the 10 G. 4, c. 8, on proving the requisite value, after deducting the several proportions of rent which each was in equity liable to contribute. In that case, as well as this, it could not be denied that every single portion of the premises under demise was liable to distress for the landlord's rent; but the portion which, in equity, was contributable, was all that was considered the charge. In *Chase's Case*, (b), the Middlesex Committee decided, that where a mortgage comprised different estates, the rents and profits of which were much greater than the interest of the sum borrowed, the vote was good, thereby adopting the principle of contribution of charges. In *Cury's Eq. Cas. Abr. Anon. 33, Pl. 5*, it was decided that rents, though charged in point of law on each and every part, are distributable over the entire of the premises, and the tenant of each part can compel a contribution from the others. As such, then, the appellant sought that the portion of his rent which would thus in equity be contributable, ought *per se* to be accounted the rent or charge payable out of the premises from which he seeks to register.

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*Mr. Latouche, contra.*—This case has been argued on the same principle which governed the decision in *Cunningham's Case*, but the present case is very different. In cases of joint tenancy, each co-tenant is liable to the landlord in debt or covenant for his proportion of the rent (c); whereas in the case of an under-letting, the under-lessee is not personally liable to the landlord. In the one case, the land is liable to distress and the co-tenant to a personal action; in the other, the land only is liable.

Two things are requisite to determine what is a charge under the principle of the election acts—First, the lands must be liable—Secondly, the claimant must be personally liable; and accordingly, a mortgage created by the head-landlord is no charge with respect to a sub-lessee. Rent issues out of each and every part of the land. Could the claimant swear that his qualification was £10 over all charges to which he was liable with respect to the land if he omitted a part of the head-rent? The landlord would look to his own lessee for the payment. The oath of the jury prescribed by the 10 G. 4, is still in force; *Glennon's*

(a) Alc. Reg. Cas. 3.

(b) 2 Peck. 103.

(c) 2 Saund. 182, note 2.

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*Case(a)*. They are to try what is the value over and above all rent and charges to which the claimant's land is liable.

To allow apportionment would be to permit a third person to discharge the claimant of his own liability. In *Rose's Case(b)*, it was held that an agreement on the part of the landlord to pay the taxes, could not discharge the claimant from his liability; and in *Ample's Case(c)*, it was held that the owner of a shop must swear to qualification over and above *all* the taxes, although he holds but part of the house, and his landlord pays the taxes. The legislature has always been careful to guard this class of voters, viz., 40s., now £10, from temptation; accordingly, their affidavits are very particular; their modes of occupation must be stated, as well as the dates of their leases. How is the rent to be apportioned? Is it on each acre, or on the proportional value? All the buildings might be on a very insignificant portion. What would be the apportionment of the rent on the land?

The case of a mortgage being apportioned, cited by Mr. *Monahan*, is not in point. It was formerly doubted whether a mortgage was a charge under the construction of the Election Acts. *Simson*, in his treatise, assigns the reason; *Gifford on Elections*, 66. The land is only the pledge, the debt is personal. On the death of the mortgagor, his assets are first liable. On a bill of foreclosure, all parties must be before the Court, with a view to contribute; in case of rent, it is a primary charge. The land is held on the condition of its being paid.

WOLFE, C. B.

This case must be governed by the same principle that ruled *Cunningham's Case*. I cannot perceive any substantial difference in point of liability, between different portions of the lands of a sole lessee and the separate shares of several joint tenants. There can be no doubt as to the legal right of the landlord, in either case, to recover by entering upon and distraining any one portion of the lands in satisfaction of his entire rent; neither can there be any doubt that each party has his remedy over against the other to the extent of a fair and equitable apportionment. If then, for the recovery of a portion of the rent for which he is liable to be distrained, he has a remedy over against some other portion of the same lands, that remedy diminishes the amount of his charges. That is the principle of *Cunningham's Case*, and by that principle the present case must be ruled. I must therefore consider the words "rent and charges payable out of the same" to mean an aliquot part of the whole rent equitably apportioned.

Rejection reversed.—Claimant admitted.\*

(a) Alc. Reg. Cas. 55.

(b) Falk. & Fitz. 128.

(c) Ib. 130.

\* Several other cases, involving the same questions which were determined in this and the preceding case, were ruled in accordance with the above decisions.

## QUEEN'S BENCH.

*Saturday 25th, Tuesday 28th, Wednesday 29th January, 1840:*

QUO WARRANTO—CORPORATE OFFICE—ELECTION—  
CITY TREASURER.

THE QUEEN at the relation of R. KINAHAN v. DARLEY.

THIS was an application for liberty to file an information in the nature of a *quo warranto* against the defendant, to shew by what right he exercised the office of Treasurer of the Public Money of the city of Dublin. The affidavit of Alderman Richard Smyth stated, that the office of Treasurer became vacant by the death of the late Treasurer in March 1836; that upon the 2d of April, Alderman Morrisson, the then Lord Mayor, convened by summons the Board of Aldermen to elect a successor; that upon that occasion there were two candidates, Henry F. Darley, and William Smyth, the son of the deponent, and that twelve of said Aldermen voted for Smyth and nine for Darley; that five of the Divisional Justices under the provisions of 48 Geo. 3, c. 140, attended and tendered their votes for Darley, but the Lord Mayor refused to receive the same, on the ground that they were not entitled to vote, and declared Smyth duly elected; that Smyth entered into security and performed the other requisites under 49 Geo. 3, c. 20; that counsel on behalf of Darley then handed a protest to the Lord Mayor against the validity of said election; that there were at and before the death of the late Treasurer, and from thence continually, three other Divisional Justices, viz., Arthur Hamilton, Joseph Gabbett, and George Studdert; that said Arthur Hamilton during that time was within summons, and might have been summoned, but was not summoned to attend said election, and did not attend same; that said Studdert was also within summons, and might have been summoned, but was not, and did not

Where S. and D. were candidates for the City Treasurership in 1836, and the former was elected; the Returning Officer (the Lord Mayor) having rejected the votes of some of the Divisional Justices of the city, who attended and tendered them for D.; and D. subsequently filed an information in the nature of a *quo warranto*, and obtained a verdict that S. was not duly elected, to which exceptions were taken, and afterwards overruled, the Court holding that these Justices had a right to vote at this election;

D. then applied for a *mandamus* calling on the Lord Mayor to convene a meeting to complete his election, and at the same time S. applied for a *mandamus* to the Lord Mayor to hold a new election, on the ground that the former was void, the Court granted the former and refused the latter application; to this *mandamus* the Lord Mayor made a return setting out that the Divisional Magistrates were not duly summoned, &c., to shew that the election was void; and while the question thereby raised was pending he held another election, at which S. was the only candidate, and was elected; D. then obtained an order to quash the return, and for a peremptory *mandamus* to the Lord Mayor, by virtue of which he was put into possession of the office; the present relator now applied for a *quo warranto* against D., upon the ground that the election of 1836 was void, the Justices not having been duly summoned, and although it was insisted, amongst other things, that this was really S.'s application, who had hitherto insisted upon the validity of that election, and who had two or three opportunities on which he might have raised the same questions he now sought to raise, and either omitted to do so or failed upon them; the Court made the rule absolute.

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attend said election; that Gabbett was within summons until the 31st of March, and might have been summoned, and that he did not attend said election, and that he told deponent that he had received no notice of same; that in Easter Term 1836, Darley obtained leave to file an information in the nature of a *quo warranto* against Smyth; that same was filed as of that Term, and the only issue joined was that Smyth was duly elected; that upon the trial in the Sittings after Trinity Term 1837, there was a verdict that Smyth was not duly elected; that exceptions were taken to the Judge's charge, for directing the jury that the Divisional Justices were entitled to vote, but these were subsequently overruled, the Court holding that these Justices were entitled to vote, and judgment of *ouster* was given against Smyth; that in Hilary Term 1839, an application was made on the part of Smyth for a *mandamus* to compel the Lord Mayor to hold a new election; and a similar application on the part of Darley, to compel him to convene the Board of Magistrates, for the purpose of completing every act necessary for admitting him (Darley) into the full possession of the office; that Smyth's application was refused, and that the Court granted the *mandamus* sought by Darley; that Alderman Hoyte, the then Lord Mayor, made a return to this *mandamus* detailing the facts connected with the election of 1836; that said Hoyte, on the 21st February 1839 (while the question upon the return to the *mandamus* was pending), convened a meeting of the Board of Magistrates to elect a Treasurer in the room of Smyth, who had been removed; that fourteen electors attended who voted for Smyth, the only candidate, and he was declared duly elected by said Hoyte, and he again entered into security, and performed the other requisites. In Easter Term 1839, an application by Darley to quash the return to his *mandamus* was granted, and a peremptory *mandamus* issued to Hoyte to declare Darley duly elected, which was accordingly done, and Darley entered into security, and performed the other requisites for completing his election; and since the 22d June 1839, he continued to act as Treasurer. The affidavit of Robert Kinahan, the relator, merely stated, that before and on the 2d of April 1836, he was and from thence continually had been, and then was an inhabitant householder of the county of the city of Dublin, and rated to the grand jury cess in the said county of, &c. An affidavit by Mr. Studdert corroborated the statements in Alderman Smyth's affidavit with respect to himself; and the affidavit of the Town-clerk stated that he merely summoned the Board of Aldermen, as was usual, to the election of the 2d of April 1836, and that he did not, nor did any other person for him, summon the Divisional Justices. The affidavit of the defendant Darley for the most part admitted the statements in Smyth's affidavit as to the proceedings that had taken place, but insisted the question raised upon Darley's information was, whether he or Smyth was rightfully the Treasurer of the Public Monies, and that it was then competent

to Smyth to try the question which he seeks to try by this proceeding; that upon the discussion of the *mandamus* moved for by Smyth, and also that moved for by deponent, all the facts now relied on were then pressed upon the Court, and then for the first time Smyth insisted upon the invalidity of the election of 1836; that not having availed himself of these two opportunities, and also of the opportunity upon the occasion of the return by Hoyte, which was framed by Smyth's counsel, when this question might also be raised, the Court ought not to suffer the deponent to be further harrassed by such proceedings; that Alderman Smyth had, as deponent believed, persuaded the Corporation to undertake the management of all these proceedings on behalf of Smyth, and bear the costs of all such proceedings; that Kinahan had no interest whatever in this question, but was merely put forward by William Smyth, and that this was really the application of the latter; that Studdert was fully informed of his right to vote at the election of 1836, by deponent and Ponsonby Shaw (who corroborated this statement by an affidavit), previous to the day of said election, and might have attended if he thought proper; and the deponent and Shaw further swore that they requested A. Hamilton to attend and vote, but he stated it was not his intention to do so, and that he would not vote for either deponent or Smyth; that two days before the 2d of April he called to request Mr. Gabbett to vote for him, and that he was then told he was in Cork, which Gabbett had since informed him by letter was the fact, and added therein that deponent was entitled to his vote according to his promise, to which letter deponent referred.

The *Attorney-General* (Mr. Brady) obtained a rule *nisi* last Term, against which,

Serjeant *Greene*, with whom were Messrs. *Smith*, Q. C., and *Darley*, now shewed cause.—The issue joined in the pleadings in *Darley's* information, which was whether Smyth or *Darley* was rightfully elected, would be of the utmost importance regarding the decision of the Court, the judgment of the Court then being in *Darley's* favor. With respect to the two applications for writs of *mandamus*, Smyth's went upon the ground that the office was vacant, the former election being invalid, while *Darley's* on the contrary went upon the ground that it was full of *Darley*, and the Court granted the latter *mandamus*. In *Kinahan's* affidavit some statement of his interest in the matter, or the proceedings that had taken place, would have been expected, but not one word on these subjects or upon the merits of the case. Smyth then induces the Lord Mayor to raise the very question now before the Court by the *mandamus*, and while that question is depending, he further procures the Lord Mayor to convene a meeting at which he is elected. An act of parliament having passed since the election in

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1836, depriving the Divisional Justices of their right to vote, Darley cannot now get in; and besides, if judgment of *ouster* was had against Darley, and he thus put out of the way, Smyth would be in by the election of 1839, and he could not be disturbed. The allegations in the affidavits as to the absent parties are not that they had not notice, but that they were not summoned. I regard this as Smyth's application, and made upon grounds which he omitted to rely upon on former occasions, when he had ample opportunity of doing so, or having relied upon them failed to satisfy the Court; and in *Regina v. Manchester Railway Company (a)*, Lord Denman says, "it is nearly an universal "and inflexible rule that the Court will not allow a party to succeed on "a second application, who has previously applied for the same thing "without coming properly prepared," and his Lordship referred to *Rex v. Orde (b)*, where Lord Tenterden pronounced a similar rule. The case of *Rex v. Carliol (c)*, has been relied on upon former occasions, but the decision in that case was to restore a person to an office from which he had been unjustly removed; and that might be said of most of the cases that will be cited on the other side. I admit there should be in general regular notice, and no surprise, and here there is none; and there being no particular mode of convening the magistrates pointed out by the act, I am justified in calling this a captious objection; and if the electors know of the election and do not attend, the convention is good, and the election valid.—[CRAMPTON, J. does not the word "convene" import something more?—Darley swears he canvassed these persons who were absent, and I am arguing for Darley, who is innocent of any omission, and with it, if there were any, he ought not to be visited. The summons is only necessary to apprise the parties; and in truth this case is analogous to *Rex v. Osbourne (d)*, where Lord Ellenborough said, in reference to an objection like the present, that "it was resorted to as a forlorn hope" and refused to listen to it. I have hitherto argued this case as an application *de novo*, but if this were granted there is not a principle, as respects *quo warranto* proceedings, that would not be violated. This is a motion to the discretion of the Court; it was not so formerly, but it has been laid down by Lord Mansfield to be so. The Courts first interfered in regard to the length of time within which the relief was sought, *Rex v. Stephens (e)*; and in *The Winchelsea causes (f)*, his Lordship said that "the granting the rule "or refusing to grant it would depend upon the particular circumstances "of each case:" and also in *Rex v. Wardroper (g)*, Lord Mansfield says "the Court are to exercise a sound discretion upon the particular circumstances of every case;" and upon this principle the Court ought to

(a) 8 A. & E. 427.

(c) 2 Str. 385.

(e) 1 Burr. 433.

(b) 8 A. & E. 420.

(d) 4 East 326, 336.

(f) 4 Burr. 1962.

(g) 4 Burr. 1963.

reject the application of the present relator, who is now put forward by parties who had an opportunity of trying this very question on three former occasions. The case of *Rex v. Marten* (a), contains a summary of the law uniformly adhered to, and the present case comes within every principle laid down in that decision. It will be urged that if there be a question, the Court will not prevent its being tried, but in the last case (b), Lord Mansfield lays down three rules to regulate the discretion of Court in this respect, and a compliance with the present application would be a violation of each of them; first, as respects the relator here; secondly, as to his motives and those of the party really making the present application; and thirdly, as to the consequences of granting the information. Smyth comes forward here in an infinitely more unfavorable light than any party in that case; his motives and his purposes the Court will not further; and if they have any regard to the law of the land, they will prevent the consequences which would flow from granting the present application. As to the general principles which regulate the Court in cases of this kind, I may refer to *Rex v. Stacey* (c), *Rex v. Mortlock* (d), and *Rex v. Peacock* (e). As to the discretion of the Court, *Rex v. Cudlipp* (f) establishes two points; first, that the Court will not grant a *quo warranto* to a party for a defect of title in another, which applies equally to his own; and secondly, that it will consider who is the relator; and in that case Lord Kenyon said "it was a mere subterfuge to say that those two persons are the real prosecutors of this rule; and our proceedings would be laughed at and treated with contempt, if we were so to decide;" and the rule was on these grounds discharged: and the same doctrine prevailed in *Rex v. Trevenen* (g), *Rex v. Parry* (h), and in *Regina v. Manchester Railway Company* (i). For the circumstances which have been held to afford sufficient grounds for refusing the information, I may refer to *Rex v. Bracken* (k), *Rex v. Cowell* (l), and *Rex v. Parkyn* (m); in the latter case it was held to be a valid objection to the relator that he was present at and concurred in the proceedings when the objection was taken and overruled, and this occurred in the present case. Upon the same point the cases of *Rex v. Payne* (n), *Rex v. Symmons* (o), *Rex v. Slythe* (p), and *Rex v. Wardroper* (q), are most important. The present case is unexampled, for the real applicant not only concurred in every thing done, and had himself

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(a) 4 Burr. 2120.

(c) 1 T. R. 1.

(e) 4 T. R. 684.

(g) 2 B. &amp; Al. 479.

(i) 8 A. &amp; E. 413.

(l) 6 D. &amp; R. 336.

(n) 2 Chy. R. 369.

(p) 6 B. &amp; C. 240.

(b) p. 2123.

(d) 3 T. R. 300.

(f) 6 T. R. 503.

(h) 6 A. &amp; E. 810.

(k) Al. &amp; N. 113.

(m) 1 B. &amp; Ad. 690.

(o) 4 T. R. 223.

(q) 4 Burr. 1963.

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electd; but he swore in his affidavit upon the former motion, that he was not only Treasurer *de facto* but also *de jure*, and pleaded the same to the information: after such proceedings can he be listened to saying that there was no election at all? Another ground upon which we rely is this, that if this objection exist it ought to have been made at the election, or at all events before Smyth was ousted, because then Darley could have come to this Court for a *mandamus*, and the question could be tried; which is a strong circumstance to regulate the discretion of the Court. Could he have said there was no election when he was acting; and if not, will he be listened to now, saying that he was an usurper? Another ground for refusing this application is, that it is an attempt to re-argue a question which this party had three opportunities of arguing before; *Rex v. Stacey* and *Rex v. Orde*, and *Regina v. Manchester Railway Company*, where Lord Denman laid down what he called an inflexible rule, as I before mentioned. In obtaining the Corporation funds to sustain him in direct violation of the 2, 3, *Vic. c. 76*, and in inducing the Lord Mayor to hold the second election while the question between the parties was depending in this Court, Smyth has been guilty of misconduct, which disentitles him to the favor he now seeks. As to the consequences—first, if the election in 1836 should be declared invalid, then the election held in 1839 in defiance of this Court becomes valid, and Smyth is in office; secondly, irreparable injury is done to Darley, for many of his supporters who were entitled to vote at the time of the election have since been disqualified, and he cannot therefore succeed; thirdly, it would overrule and defeat a former decision of this high Court; Darley is in office by year own writ, and that not a proceeding by which Smyth can allege he was not bound.

The *Attorney-General* and Mr. *Smith*, Q. C., with whom was Mr. *H. West*.—The 49 *G. 3. c. 20*, directs the Lord Mayor to “convene” the Board of Magistrates, and the question is did he do so? It is now decided that the Divisional Justices formed a part of that Board, and it cannot be denied that some of them who were within summons were not convened. It is conceded that the Divisional magistrates were not summoned, and there were three of these persons in Dublin, who ought to have been and were not summoned, and who did not attend; this is a fatal objection, *Rex v. May (a)*, *Rex v. Langhorne (b)*, and same doctrine is laid down in *Tancred on quo warranto 52 et seq.* The Court will consider well before it will turn round a party who would be without remedy. If he were not aware of the illegality of the election, the party's concurrence raises no objection, *Rex v. Smith (c)*,

(a) 5 Burr. 2692.

(i) 6 Nev. & M. 203.

(c) 3 T. R. 573.

Rex v. Brown (a), *Rex v. Morris* (b); nor is it any answer to an application like the present that the relator acted with the party, *Rex v. Benney* (c), *Rex v. Wakelin* (d). We fully admit the proposition that a person present and concurring in the election cannot afterwards dispute it, *Tancred* 38, 39; as if Darley, after using the votes of the Divisional Justices, afterwards objected to their right to vote. But that principle cannot apply to the present case; there is no concurrence in Kinahan, because it must be by a person who took part in the election; there is no acquiescence on the part of Kinahan in the title of the Justices, and the Court, by deciding that they were improperly rejected, virtually declared the election void; and even if Kinahan was concurring, the objection being a latent one, he would not be disqualified from being a relator, *Tancred*, 40. There is no estoppel here upon the ground that this question might have been adjudicated upon before; we contend that from the frame of the pleadings in the information of 1836, it could not have been raised in that case; in the return to the *mandamus* we actually raised this question, but from a slip in the pleading we were not able to bring it rightly before the Court. As to the Corporation paying the costs of these proceedings, they were fully justified in doing so, because heretofore the Board of Aldermen were exclusively the electoral body; and as to any misconduct upon the part of Smyth, there was much more upon the other side, in endeavouring secretly to get these parties to vote without notice or summons; but in point of fact this part of the case was disposed of in *Regina v. Hoyts* (e). That this office is a proper subject for *quo warranto* this Court has already decided. Upon these grounds we submit that there does not exist valid objection to the present relator, and if the election in 1836 was void, that Darley ought not to have the fruits of the office as if he had been duly elected.

Mr. *Holmes* replied.—Kinahan must be considered here as a perfect stranger; as a rate-payer he has no interest; for the grand jury applot, and assessors lay on the assessment; the Treasurer is a mere trustee of the money.—[BUSHE, C. J. Is he not interested in the solvency of the Treasurer?—Just as far as every member of the community is, and I admit this Court will grant this writ to a stranger where the public are interested; but in the present case the public are not concerned. By the 49 G. 3, c. 20, the Treasurer is bound to lodge the money weekly, and Smyth swears Darley entered into the requisite securities; there is not a pretence for saying that the public is more interested in having Smyth than Darley. The Court cannot wink at this, that Smyth is the real applicant here; and why was Kinahan put forward? Merely

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(a) 3 T. R. 574, note.

(b) 3 East, 213.

(c) 1 B. & Ad. 684.

(d) 1 B. & Ad. 50.

(e) 1 Jebb & S. 636.

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to get rid of the cases cited by Serjeant *Greene*. Even admitting the objection for want of summons to be a good one, in the present case it is a mere formal objection, because if a due summons had been given to all, my client would be in office; there are eight Justices, five of whom attended and voted for Darley; of the three who remained away, Hamilton said he would not vote, and the other two would neutralise the votes of one another; and, therefore, had the Lord Mayor summoned all, the result would have been the same; and for that reason substantially, and upon the merits of the case Darley is in office; and the Court is now called upon, when things cannot possibly be put into *statu quo*, in consequence of the statute which passed since, depriving the Justices of their right to vote, to allow this formal objection, and defeat the real merits of the case. Can the Court mistake the deceptive object of this application? Let Darley be ousted and Smith will then insist that he is Treasurer *de facto* and *de jure* by an election held in contempt of this Court. The cases cited by Serjeant *Greene* establish this, that the Court will in its discretion go much further than is required in this case, in refusing such applications when the public is not interested: they will leave the complainant to his action at law; they will not give him this prerogative writ, but stand neutral between the parties. *Willcock on Corporations*, 476 Pl. 401; *Rex v. Parry (a)*. This is an *a fortiori* case, for if what was omitted had been done, the result would have been the same; and this party having first insisted that the Justices had no right to vote, now shifts his ground and complains that they were not summoned; all this time putting Darley under the infiction of the funds of the Corporation, and procuring the Lord Mayor of that Corporation to elect him in contempt of this high Court; will the Court in the sound exercise of its discretion assist this man, or leave him to an action at law, which it is competent for him to bring? If a Corporation can be prosecuted for maintenance, they have been guilty of it in this case; 1 *Hawk. P. C.* by *Curwood*, c. 27, s. 44-5; 5 *Bac. Ab. T. Maintenance, Letter A*, 250; and this Court, which is the *custos morum* of the country, is called upon to countenance this; to countenance one party assisting another in a case of most vexatious litigation.

Monday, May 11th.

BUSHE, C. J. this day pronounced the judgment of the Court.

This case came before the Court upon shewing cause against a conditional order for liberty to file an information in the nature of a *quo warranto* against the defendant, calling upon him to shew by what authority he held the office of Treasurer of the Public Monies for the city of Dublin. We do not think it necessary at present to go at length into the

(a) 6 A. & E. 810.

matters in the affidavits filed either to sustain or to resist this rule, as we are all of opinion that the validity of Mr. Darley's election is a proper subject to be tried, and we are unwilling to prejudice that trial by any observations upon the merits of the case. In the present case, it has been relied upon on the part of the defendant, that the relator had disentitled himself by his conduct to the rule he sought; that this was a motion to the discretion of the Court, as it must be admitted to be, and that this Court, in the sound exercise of that discretion, would not upon that ground afford him any assistance. But it is conceded that Mr. Kinahan has no personal interest in this proceeding, and the fact that he was one of Mr. Smyth's sureties at the election of 1836, cannot fix him with such a participation in that election as would disqualify him from raising the present question. It is then said that Mr. Kinahan is only the nominal, and that Smyth is the real prosecutor in this case, and there is some ground for that statement; and it was then urged that Mr. Smyth, in the former proceedings, having relied upon the election of 1836 as a valid election, could not now be heard, insisting that that election was a nullity; but the Court having decided that his election upon that occasion was void, in consequence of the Police Magistrates' votes having been rejected, they are of opinion that Mr. Smyth ought not to be debarred from shewing that these Magistrates were not duly summoned. It was next contended that Mr. Smyth, by procuring the Lord Mayor to hold a meeting at which he was elected, pending the return to the *mandamus*, on which we already pronounced judgment, was guilty of such misconduct as ought to prevent the interference of the Court; but we are of opinion that the proceedings connected with that transaction have been already disposed of in *Regina v. Hoyte*. It was further insisted upon, that this application ought to be refused, upon the ground that Alderman Smyth had procured a misapplication of the Corporate funds, in order to support the case of his son against Mr. Darley; but whatever impropriety there may have been in applying the funds of the Corporation to such purposes, that misapplication took place after the election, the validity of which was disputed. Upon these grounds, we must disallow the cause shewn against the conditional order, but without costs.

Rule absolute, without costs.*

* As to the former branches of this case referred to in the foregoing report, see the argument on the bill of exceptions, 1 *Jebb & S.* 164; upon the applications by each for a writ of *mandamus*, *Ibid*, 468; and upon the Lord Mayor's return and for an attachment against him, *Ibid*, 621.

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Thursday, January 16th.

PRACTICE—LOST WRIT—ISSUING DUPLICATE.

Lessee DONNELLY v. MALONE.

Where a sheriff against whom an order had been obtained for a fine for not returning a writ of *habere facias possessionem*, under which possession had been given, applied for a duplicate writ, and stated in his affidavit that the original had been lost, and could not be found since the execution of it, his motion was granted, upon payment of all costs.

MR. ROLLESTON, on behalf of the sheriffs of the city of Dublin, applied for liberty to issue a duplicate writ of *habere facias possessionem* in this case. The affidavit of the sub-sheriff of said city stated, that he duly executed the first writ, and gave possession under it to the plaintiff; that the writ was afterwards lost, and that diligent search had since been made for it, but without effect; that in the mean time the lessor of the plaintiff obtained a conditional order for a fine upon the sheriff for not returning the writ, and the sub-sheriff now applies for the duplicate writ at his own expense.

COURT.—Let the said sheriffs be at liberty (but at their own expense) to issue a duplicate of the writ of *habere facias possessionem* which formerly issued in this cause, and which is sworn to have been lost since the execution thereof, in order that said sheriffs may return the same, upon the terms of paying to the lessor of the plaintiffs costs of said conditional order, serving this order forthwith.

CRIMINAL INFORMATION, WHEN REFUSED—
AFFIDAVITS ON MOTION FOR.

The QUEEN, at the prosecution of KNOX v. ANDERSON.

In motions for leave to file criminal informations, the parties applying are bound to disclose all the circumstances connected with the transaction out of which the complaint had arisen, as the suppressal of

THIS was an application for a criminal information against the defendant, for using language towards the prosecutor calculated to provoke a breach of the peace. Upon shewing cause, it appeared that the prosecutor had suppressed some of the circumstances out of which the prosecution arose; and, upon other parts of the case, the affidavits of the parties were contradictory.

BUSHE, C. J., in allowing the cause shewn, said—It is an inflexible rule of any of them will be ground of cause against making the rule *nisi* absolute. Where the affidavits are contradictory, the Court will, on motion for that purpose, allow the complainant to file supplemental affidavits; but if he do not so apply, it will discharge the rule.

rule of this Court, in cases like the present, to require from the party who first complains, that he should disclose the whole of the circumstances connected with the transaction of which he complained; that has not been done here. Another rule is, that where there are contradictory affidavits, the Court will not decide, but it will give the prosecutor liberty, if he apply for it, to file supplemental affidavits. In this case he omitted to do this, and, therefore, upon both these grounds, we must discharge the rule, but without costs.

Rule discharged, without costs.

Tuesday, January 28th.

PRACTICE—JUDGMENT AS IN CASE OF NON-SUIT—
SUFFICIENCY OF CAUSE AGAINST.

ANONYMOUS.

MR. B. STEPHENS shewed cause against a conditional order for judgment as in case of non-suit. He relied upon an affidavit, stating that notice of trial was served for the 1st of February; that it was the plaintiff's intention to proceed therewith, and that the plaintiff had a just and good cause of action on the merits. The amount sought to be recovered was only £5. In *Stone v. Farey (a)*, and *Nicol v. Collingwood (b)*, a slight excuse was held sufficient; and in a very recent case the Court of Exchequer allowed similar cause, refusing to act upon the case of *Gillman v. Connor (c)*, in this Court.

Mr. Wall, *contra*, relied upon the decision in *Gillman v. Connor*, and that the plaintiff in this case gave no excuse whatever for his delay.

BURTON, J.

The case of *Gillman v. Connor* is accurately reported, and the construction of this Court upon the statute is correctly stated. In that respect we are at variance with the Court of Exchequer. The circumstances of this case, however, are different, and, under all the circumstances, we do not think *Gillman v. Connor* rules it.

PERRIN, J.

Without disturbing the case of *Gillman v. Connor*, which was fully considered, conjecturing that the smallness of the sum may have been the cause of the delay, we allow the cause shewn in this case.

Rule discharged.

(a) 1 East, 554.

(b) 2 Dowl. P. C. 60.

(c) 1 Ir. Law R. 346.

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Upon shewing cause against a conditional order for judgment as in case of non-suit, it appeared that notice of trial was served that the sum sought to be recovered was only £5, and the plaintiff swore that he had a just and good cause of action—Held to be sufficient cause, and the rule was discharged.

Thursday, January 30th.

PRACTICE—JUDGMENT ON *NILS* IN *SCIRE FACIAS*—
WRIT OF RESTITUTION.

Lessee of ASHLEY and others v. The Casual Ejector.

Where it appeared that an ejectment was brought against certain lands, and several under-tenants were dispossessed under the *habere* upon the 10th of Jan. 1838, but allowed to return into possession, and remained undisturbed until the 11th of January, 1840, when they were again dispossessed by virtue of an *habere* upon a judgment in *scire facias* in this cause, and of the proceedings in which the several tenants swore they had no notice whatever — Held, that a writ of restitution should issue to restore these parties to their possession.

Seemly, that the practice of reviving judgment upon *nils* is irregular.

THIS was an application that the writ of *scire facias* which issued in this cause to the sheriff of the county of Roscommon, and the proceedings had thereunder, should be set aside, and that a writ of restitution should be issued, to restore the several persons on whose behalf the application was made, to the possession of their respective holdings. It appeared from two affidavits filed by the tenants of the lands of Tenacreva and Ballyhobart, in said county, respectively, that ejectments for non-payment of rent were brought by the lessors of the plaintiff as of Trinity Term, 1837, against their immediate landlord; that in October they were served with these ejectments. No defence having been taken either by them or their landlord, the lessors obtained judgment; and in November, 1837, a writ of *habere* issued on said judgment, tested the 25th of November, 1837, and returnable on the 10th of January following: that possession was taken by the sheriff, under and by virtue of said writ, on the 10th of January, 1838, after the execution of the *habere*, and the applicants were again permitted to take possession of their several holdings, and continued in the undisturbed possession of them throughout the years 1838 and 1839; that from the month of October, 1837, they were not served with any law paper, nor had they any notice of any proceedings having been taken by the lessor for the recovery of said lands, until the 11th day of January, 1840, when the sub-sheriff for the said county again dispossessed them of their holdings. The affidavit of the Returning Officer stated, that in August last the attorney of the lessor of the plaintiff called upon him, and asked him for these writs, without putting a return thereon, stating that he wanted to consult the Officer of the Court, as the tenants, after being put out, had re-taken possession; that there was at that time endorsed on said writs, "possession 10th January, 1838," and a similar entry in a book kept by deponent, in which he entered the writs returned by the sheriff. The affidavit of the attorney of the applicants stated, that having been made acquainted with the foregoing facts, he searched for and found the writs of *habere*, with the endorsement already mentioned, in the handwriting of the sub-sheriff; that upon further search, he found that the attorney for the lessors had issued two writs of *scire facias* to revive these judgments, and having obtained judgment thereon in Michaelmas Term, 1839, he issued two other writs of *habere*, directed to the sheriff of said county, grounded upon said last judgments, and possession was again taken from the defendants upon the 11th of January, 1840, thereunder.

Mr. *Baker* now applied upon these affidavits for a writ of restitution, to restore the tenants who had been turned out of possession under the foregoing circumstances. He stated that this proceeding arose out of a vicious practice which existed in this country. In England the practice is to make the terre-tenants parties to the *scire facias* to revive a judgment in ejectment; but in this country the return is made on *nihil*. Lessee of *Pope v. Casual Ejector* (a).

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CRAMPTON, J.

This proceeding cannot be justified; it is converting a *scire facias* into an ejectment; the *scire facias* and the proceedings had thereunder must be set aside, and a writ of restitution issue, to restore these tenants.

Motion granted.*

(a) 1 Alc. & N. 43.

* No judgment can be signed in without leave of the Court. 2
England upon a return of *nihil*, *Archb. Pr. by Chitty*, 612-13.

Friday, January 31st.

PRACTICE—RETURNING INFORMATIONS—ADMISSION OF PRISONER TO BAIL.

THE QUEEN v. CORBETT.

MR. PEEBLES applied for an order that the informations in this case should be returned, in order to enable the prisoners to apply to be admitted to bail.—[BURTON, J. What is the charge?—Felony.—[BURTON, J. What is the ground for admitting the prisoners to bail?—The affidavit merely states that they applied to be admitted to bail below, and that that application was refused, and they seek to make their case for admission to bail before this Court, when the informations are returned.

An application for an order to have informations returned, in order to ground a motion for admitting prisoners to bail, is not a motion of course; some ground must be stated in the affidavit.

BURTON, J.—It is not a matter of course to order informations to be returned; some ground ought to be stated in the affidavit.

PERRIN, J.

More particularly now when you can obtain copies of the information.*

No rule.

* 6, 7, W. 4, c. 114, s. 3.

Friday, January 31st.

**PRACTICE—JUDGMENT AS IN CASE OF NON-SUIT—
INSUFFICIENCY OF CAUSE AGAINST.**

———— *v. WORTHINGTON.*

Where in an action for false imprisonment, arising out of a disputed right of fishing, the cause had been at issue since Michaelmas Term 1838, and the delay from thence until June following was not accounted for, except by an allegation that the principal action, to try the right, was pending during that time, and since June the plaintiff was unable to proceed in consequence of the illness of his attorney; *Held*, that the cause was insufficient, in not accounting sufficiently for the delay previous to June, and the rule was made absolute.

MR. WEST, Q. C., applied to make the conditional order in this case for judgment as in case of non-suit absolute; the cause had been at issue since Michaelmas Term 1838. The affidavit filed as cause alleges no excuse for not proceeding to trial prior to the latter end of June 1839, at which time it is stated the attorney took ill, and was since unable to attend to business; and the offer they make even now is to go to trial at the Easter Sittings.

Mr. Brewster, Q. C., *contra*.—The action was for false imprisonment, arising out of a disputed right of fishing; we are ready now to go to trial in any time the Court should think reasonable.—[PERRIN, J. It lay upon you to account for the delay prior to June.]—The principal action, namely, to try the right, was pending during that time. Surely if I undertake to go to trial to-morrow, the Court will not prevent us by granting this motion.

THE COURT considered the cause insufficient, and made the

Rule absolute with costs.

CASES IN THE QUEEN'S BENCH.

EASTER TERM, 1840.

Monday April 22d.

NEW TRIALS—WEIGHT OF EVIDENCE—SURPRISE— HAND-WRITING.

SMITH v. M'GONEGAL.

ASSUMPSIT.—This was an action by the plaintiff against the defendant as the acceptor of five bills of exchange, amount £1376. The case was tried before BURTON, J., at the Summer Assizes for the County of Antrim, and a verdict returned for the plaintiff for two of the said bills, amounting to £523. A rule *nisi* had been obtained last Term, to set aside that verdict upon the ground of surprise and misrepresentation, and also that it was obtained against the weight of evidence. Upon shewing cause the following affidavits were relied on. The affidavit of the defendant, after stating the proceedings to the verdict, went on positively to aver that he had never seen either of the two bills on which the plaintiff recovered until they were produced at the trial, and that the name of deponent, signed to each, was never written by deponent, but was written by some person or persons without his knowledge or consent, or any authority direct or indirect from the

On an action against the defendant as acceptor of certain bills of exchange, the plaintiff produced three witnesses, one of whom, who had but imperfect means of knowing the defendant's hand-writing, after stating his belief that two of the bills were accepted in the defendant's hand-writing, admitted that he thought the

acceptance of one of the bills was more like the defendant's hand-writing than the other; the second witness having also given general evidence as to his belief of these two acceptances being in the defendant's hand-writing, gave the same evidence as the last witness, as to one being more like his hand-writing than the other, and added that the hand-writing of the defendant's nephew was very like the defendant's; the third witness swore positively that neither of these bills was in the hand-writing of the defendant and that one of them was written by his (the witness's) brother; upon this evidence there was a verdict for the plaintiff, the defendant not having examined any witness. Upon motion to set this verdict aside upon the ground that it was had against the weight of evidence, and by surprise, grounded upon affidavits in which the defendant positively stated that he never accepted these bills or authorised any one to do so, and that he was misled by the belief that, from some observations made by plaintiff's attorney, he intended to rely solely upon a case of authority and not of actual hand-writing; *Held* that this verdict was not against the weight of evidence; but the Court without admitting the surprise, considering that the evidence of the hand-writing was not satisfactory, and also the positive swearing of defendant, granted the motion for a new trial upon terms.

Semble.—That where a party means to rely upon a case of surprise, he ought to bring the circumstances under the consideration of the Judge at the trial, and have a note taken of it.

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deponent, and that he would not trust any person or persons in existence with such an authority ; that he was wholly surprised by the case made at the trial being at variance with the case which the plaintiff's attorney informed deponent's nephew he would make, and if not so surprised and misled, he would have had many respectable witnesses to disprove the fact that the acceptance of said bills was in deponent's hand-writing; that the surprise arose in this way, that on the 25th of May, 1839, the attorney of the plaintiff called at deponent's house in his absence, and the two witnesses who proved the defendant's hand-writing on the two bills on which the verdict was had, met him there by appointment, as deponent was informed, and that the attorney of the plaintiff then shewed to deponent's nephew the five bills, and inquired from his nephew if any of them were in deponent's hand-writing, and that his nephew told him, as the fact really was, that none of them were in deponent's hand-writing ; whereupon the attorney of the plaintiff told his nephew as deponent was informed (this statement was corroborated by the affidavit of the nephew), that he was prepared to prove that two of said bills were accepted by him (the nephew) in the name of deponent, and by his authority, and that the other three were accepted by the wife of deponent in his name, and by his authority also ; and the nephew swore that Green and Hyndman gave as their opinion that the said two bills were in his, the nephew's, hand-writing ; that deponent, in consequence of this, made no preparation whatever to meet a case of actual hand-writing, but one solely of authority, and referred to the direction of proofs for his defence ; that at the trial three witnesses were produced on behalf of the plaintiff, W. F. Green, R. A. Hyndman and Charles Doherty ; and the latter witness, who was the brother-in-law of the deponent, and had served his apprenticeship to him as an attorney, deposed that the name of deponent on one of said two bills was in the hand-writing of his brother Hugh Doherty, and that he could not tell in whose hand-writing the name of deponent on the second bill was, but that it was not accepted in the hand-writing of deponent ; that Hyndman in his examination admitted the name of deponent on one of said bills was not so like the hand-writing of deponent as the other, and on his cross-examination, it appeared he derived his knowledge of deponent's hand-writing from certain notices which passed between the attorney to whom defendant served his time, and the attorney to whom deponent served his time, ten or eleven years before ; that Green also deposed that the name of deponent on one of the two bills was not so like deponent's hand-writing as that upon the other, and that the hand-writing of deponent's nephew was very like deponent's ; that plaintiff's attorney subpoenaed Mr. Martin, Clerk of the Crown for Londonderry, as a witness, but did not produce him, as upon seeing the bills, Mr. Martin, as deponent was informed, declared them to be forgeries ; that

plaintiff's attorney was twice applied to by deponent's nephew (who corroborated this statement) to shew him the bills in order that he might see in whose hand-writing deponent's name was, but that they would not be shewn to him. Daniel M'Gonegal, the nephew, in his affidavit swore positively that the said two bills were not accepted in the defendant's hand-writing; and stated that in a conversation he had with Green since the trial, Green said that from the evidence by Doherty, he, Green, might be mistaken, and that in case there was a new trial he would not go the same length he had gone on the previous trial; deponent swore to his surprise by the case made at the trial. M'Kenny, who transacts the Dublin business of the defendant, in his affidavit stated, that he got the direction of proofs prepared by counsel, and made out the briefs solely to meet a case of authority, and was astonished when he heard of the case made against the defendant at the trial; that he was well acquainted with defendant's hand-writing, and that he would have attended if he had any idea that the plaintiff would take the course he did. The affidavits also charged that these proceedings were delayed until James, the brother of Hugh Doherty, and other members of his family whom M'Gonegal swore he believed knew every thing about the manufacture of these bills, had gone to America. Hugh Doherty, who was the drawer of the bills, had died before the trial. The affidavit of James Andrews, the plaintiff's attorney, stated that proceedings on these bills were delayed solely at the instance of Charles Doherty, who on the 5th of November, waited on the plaintiff on behalf of the defendant, and upon the promise of said Doherty that the allegation of forgery theretofore made by defendant would be withdrawn; that subsequently on the 12th Nov. he addressed a form of letter to the defendant, acknowledging the acceptances on the four bills then due, and requesting the defendant to sign it, but received no reply to that, or to a second letter written upon the 20th November for the same purpose, until the 20th December.—Admits he refused to shew the bills to the nephew, being acquainted with the defendant, and not knowing who he was, and upon asking him whether he was Mr. M'Gonegal to whom he had written about the bills, he said he was, and assured him he was David M'Gonegal, the defendant in this action; and he persisted to personate the defendant, although deponent told him he knew he was not David M'Gonegal, until he proposed to him to come to the office of the Messrs. Davison to be identified, when he went away saying he did not care whether he saw them or not. With respect to the interview on the 25th of May, he admitted he shewed the five bills to Daniel M'Gonegal, and asked him whether any of them were in his hand-writing, or in the hand-writing of the defendant, or the defendant's wife, and that he replied to each of these questions in the negative; that immediately before leaving the office of the defendant, he did state to the effect that he would at

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the next Assizes exhibit a case of gross fraud on the part of the defendant, and that he was prepared to prove that defendant's wife was accepting bills in the name of the defendant, and by his authority; but did not specify any of said bills as being the subject of said proposed proof, and denied the statement made with respect to the wife as to three, and with respect to Daniel M'Gonegal as to two of said bills, or any other observations save the general one above mentioned; and that nothing occurred which could or ought to have led to the belief that deponent intended to confine himself to proof of an acceptance by authority, and that if M'Gonegal's statements were true, they would have been a fit subject of cross-examination of Hyndman and Green; and also that the defendant would produce said Daniel, who was in Court, if he did not believe his cross-examination would have proved unfavorable; that Doherty admitted some of the bills were in the hand-writing of defendant's wife, and that but for a fatality he could have proved the authority in her from the defendant to accept them. There was also an affidavit of Richard M'Loughlin, denying the statements in the affidavit of Andrews, as to Daniel's personating David M'Gonegal.

Mr. Gilmore, Q. C., with whom were Messrs. Holmes and Andrews, now shewed cause.—As to the objection that this verdict is against the weight of evidence, there is no foundation for it, for the plaintiff proved his case by two witnesses, and the defendant did not give any evidence at all. With respect to surprise, there was not anything calculated to mislead the defendant, who was an experienced practitioner of this Court.

Messrs. Tomb and Whiteside.—As respects the first objection, the action was for the amount of five acceptances of the defendant; the plaintiff recovered upon two, and the defendant had a verdict as to the other three. The plaintiff called three witnesses; after much hesitation Hyndman stated according to his belief, that two of these bills were the defendant's acceptances, but upon cross-examination it appeared he had very imperfect means of knowledge of the defendant's hand-writing, acquired eleven years before: Green also hesitated for a long time, and then said one was more like the defendant's hand-writing than the other. Doherty, the third witness for the plaintiff, swore positively that neither was in the hand-writing of the defendant, but that one was positively in the hand-writing of his brother Hugh Doherty; upon this testimony, therefore, all given by the plaintiff, we confidently rely that the weight of evidence was in favor of the defendant. Then defendant swears in the most positive manner that he never accepted, and never authorised any one to accept these bills; and Green states

that in the event of a second trial he would not even go so far as he did at the trial.—[PERRIN, J. I am not satisfied that we can listen to what a witness says afterwards about his evidence.]—It is clear that Andrews communicated with Hyndman before he made his affidavit, and the reason that Hyndman has not made an affidavit is manifestly, because he could not contradict the statements of Daniel M'Gonegal.

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BURTON, J., this day referred to his notes of the trial, and stated that the substance of the evidence was, that Hyndman and Green believed the hand-writing of the acceptance of two of the bills was the defendant's; but that it appeared Hyndman had little opportunity of knowing the defendant's hand-writing; that the nephew's hand-writing was very like the defendant's, and that the acceptance of one of the bills was less like the defendant's than the other.

Mr. *Andrews* replied, and contended that it would be making a new precedent to allow a party who had an opportunity of taking the course at the former trial which he seeks to be allowed to take now, and instead of doing so, took his chance of succeeding, and when he was defeated, and a verdict is given against him, to allow him another chance now. The case of surprise has no foundation, and is a mere after-thought, and was never mentioned at the trial.

BURTON, J.—The application in this case is rested first, upon the ground that the verdict was had against the weight of evidence; but that cannot be said in the circumstances of this case, and therefore upon that ground the Court could not grant a new trial. It must be admitted that the question in this case was a very serious one, and without casting any imputation upon any one, I had much doubt upon the case. The next consideration is with respect to the grounds relied on independent of the evidence at the trial. As to the alleged misrepresentation, that must be thrown out of our consideration altogether; and then as to the ground of surprise, that in consequence of something that occurred, the defendant supposed a different case would be made from that relied on at the trial, I must say I am not satisfied that the Court ought to grant a new trial in this case upon that ground, and thus make a precedent that might be very prejudicial. The Court requires very great care to see that the fact of surprise really existed, and that the party acted in such a way as to shew it was a case of surprise; and I do not consider that that was done in the present case. The defendant says that conceiving the plaintiff meant to rely upon a case of authority, he did not prepare to disprove the hand-writing of the acceptances; but if

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there were such surprise, I would have expected that such notice would have been taken of it as would bring it under the consideration of the Court at the time, and have a note taken of it. There is this also in the present case, in relation to this alleged surprise, besides much that I am glad I am not obliged to remark upon—the presence of the nephew in Court, which makes me entertain a great suspicion about this case; if he were not actually present in Court, it is quite clear he might have been easily sent for, and the Court would under such circumstances have waited a reasonable time. But upon the whole, although the verdict is not against the weight of evidence, the Court is disposed to allow a re-investigation of this case, but in such a way as that no injustice will be done to the plaintiff; and the Court wishes it to be understood that they do not grant the new trial upon the ground of surprise, but because the evidence of the defendant's hand-writing was not as satisfactory as might be wished.

CRAMPTON, J.—I concur in the judgment which has been pronounced. The question to be tried was matter of opinion; two witnesses produced by the plaintiff hesitated in giving their evidence, and a third disproved the plaintiff's case; therefore, although the verdict is not against the weight of evidence, it is not satisfactory. I am also induced to grant the new trial, from a consideration that the plaintiff can now prove his case as to the three other bills.

PERRIN, J.—I also concur in the rule which has been pronounced, and upon the grounds stated by my brethren. I am quite satisfied there was no misrepresentation, and I greatly doubt that there was any actual surprise. But from the nature of the evidence of the defendant's hand-writing, and from the defendant positively swearing that these bills were not accepted by him, and that he has several witnesses to prove that the acceptances are not in his hand-writing, I agree in the propriety of allowing a further investigation. In doing so, I am happy we avoid making a precedent of this case by granting a new trial upon terms.

I wish merely to add, that the statement Green made subsequently to the trial does not affect me, and that I do not think it ought.

Mr. *Whiteside* then applied to have it made a part of the order that that the plaintiff should lodge the bills with the Officer of the Court for inspection; *Richey v. Ellis (a)*.

The COURT made the following order:—

Let the verdict in this case be set aside, and let a new trial be entered upon the terms of the defendant, within two months

(a) 1 Al. & N. 111.

Where the defendant alleges that certain bills on which he is sued are forgeries, the Court will order the plaintiff's attorney to exhibit them to the defendant for inspection.

from the date of this order, paying the costs of the trial and the costs of this motion; and on the further terms of the defendant undertaking to admit at the trial that the acceptance of the bill of exchange for £300 in the pleadings mentioned, bearing date the 25th day of August, 1838, is in the handwriting of the defendant's wife, and also undertaking to admit that the plaintiff is entitled to sue in this cause, and that the several bills of exchange in the pleadings mentioned were duly endorsed by the drawers, and were duly presented for payment and due notice of non-payment thereof respectively given to defendant and other parties entitled thereto; and let the said several bills of exchange in the pleadings mentioned, be exhibited by the plaintiff's attorney to the defendant, with liberty for the defendant only to inspect the same, defendant giving two clear days' notice; the plaintiff to furnish his costs for taxation within three weeks.

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Wednesday, November 16th.

EJECTMENT FOR NON-PAYMENT OF RENT—EVIDENCE—AFFIDAVIT OF SERVICE—OFFICE COPIES—PRACTICE—MARKING JUDGMENT.

*Lessee of BOYLE v. KIERNAN.**

EJECTMENT for non-payment of rent. In this case a conditional order had been obtained on a former day, to set aside the verdict and have a

In an ejectment for non-payment of rent, an office

copy of the ejectment and affidavit of service, duly attested by the Filacer, is sufficient evidence of these documents at the trial of the ejectment in the Assize Court, without proof that they have been examined.

Scintilla—That the Assize Court is the same Court as that out of which the record comes.

After the Court gives judgment, on motion to enter a non-suit, or for a new trial, it is not necessary to enter the fourth-day rule for judgment, but judgment may be signed immediately where there is no reservation in the conditional rule.

* This case was first argued on the 16th of November, 1839, and at the desire of the Court, one counsel was heard on each side, Mr. Napier for the lessor of the plaintiff, and Mr. Tombs for the defendant, on the 25th of January, 1840. The arguments on both occasions are combined in the present report.

The following are the sections of the 1 & 2 G. 4, c. 53, which were relied on:—

The 5th section enacts, that it shall be lawful for every Officer of the said Courts, and he is thereby required to employ a sufficient number of persons for copying in every such office.

The 24th section enacts, that it

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non-suit entered, upon points saved at the trial ; but the only one argued was as to the proof of the ejectment, and affidavit of the service thereof. The case was tried before BURTON, J., at the previous Assizes for the county of Louth, and it appeared that an office copy of the ejectment and affidavit of service were handed in, and the signature and attestation of these documents by the Officer who acts as Deputy Filacer of this Court, was proved. This was objected to by the defendant's counsel, who contended it ought to be proved to be an attested copy ; and, subject to this objection, the case was sent to the jury, who found a verdict for the plaintiff, and to set aside this verdict the conditional order had been obtained.

Mr. *Whiteside*, with whom was Mr. *Napier*, now shewed cause.—The rule upon this subject, as laid down in the text books, is this, that “ an office copy is in the same Court and in the same cause equivalent to a record ; but in another Court, or another cause in the same Court, the copy must be proved to be examined.” 1 *Phil. on Ev.* 613 ; 1 *Stark. on Ev.* 191 ; and in *Denn v. Lucas v. Fulford (a)*, Lord Mansfield laid down the same rule, that office copies, such as the present, were evidence in the same Court and in the same cause, without proof of their having been examined ; and the present case is clearly within that rule. In *Salter v. Turner (b)*, an office copy of an answer in Chancery was admitted in a Court of Law. In *Duncan v. Scott (c)*, where depositions sworn in a Judge's chamber, and delivered out by his clerk, were admitted, Lord Ellenborough said, “ It appears to have been delivered out in the course of office, and, *prima facie*, it must be taken to be correct ;” and the same rule was acted on in *Highfield v. Peake (d)* ; and in *Supple v. Purdon (e)*, BUSH, C. J., said, “ The Court will always be satisfied with the production of the attested copy of the affidavit of service.” It is the duty of the Officer to give accurate copies, and he is responsible for not doing so.

(a) 2 Burr. 1177.

(b) 2 Camp. 87.

(c) 1 Camp. 101.

(d) 1 Moo. & M. 109.

(e) 1 Al. & N. 139.

shall not be lawful for any Officer to cause or direct, or knowingly to permit any copy of any pleading, affidavit, &c., belonging to their respective offices, to be made in any other place, or by any other person, than in the proper office of such Officer, and by a writing clerk employed by such Officer ; and every such Officer shall be respon-

sible for the accuracy of every copy so made in his office, and for the same being duly compared with the original from which it shall be made ; and every such Officer who shall cause or direct, or knowingly permit any copy to be made contrary to this act, shall for every such offence forfeit the sum of £20.

Messrs. *Holmes and Tomb, contra*, contended that there was no legal evidence of the affidavit of service; there ought to have been a compared copy of the affidavit, as part of the title of the lessor of the plaintiff. The plaintiff first attempted, but failed to prove this to be a compared copy, and he then relied upon it as an office copy. Admitting it to be an office copy, the experience of the Court will at once pronounce it to be insufficient. What is relied on from *Denn d. Lucas v. Fulford* is a mere *dictum* of Lord Mansfield, and the point did not arise in the case.—[CRAMP-
TON, J. Could we hold that the Court of Assize is the Court of Queen's Bench? PERRIN, J. With respect to the rules of the Court, the office copies are admitted in the Assize Court.]—And every thing upon this subject in the text books that have been cited is founded upon that *dictum*, and given in the very words of Lord Mansfield. In *Gilbert on Evidence*, 17, two kinds of copies are mentioned, sworn copies and office copies; and he adds (in page 19), that in Chancery, office copies are admitted as evidence, but he says that the particular rules of that Court are not taken notice of by the Courts of Common Law; and in the same place he states that a copy of a judgment cannot be given in evidence. What are properly called office copies are such as the Officers of the Court are allowed to give for proceedings in the same Court, and that is permitted, because the Court has its Officer under their own eye; and this is plain, even from the case in which this practice was first suggested: for in that case Lord Mansfield said, "In another Court, or "in another cause, the copy must be proved." The Deputy Filacer is not an Officer of this Court; he should be proved to be so.—[PERRIN, J. The Court will take notice of its own Officer; I do not mean that while Biron (the Filacer) is here, that Johnston (the Deputy) could attest copies; it must be when the latter is appointed by a proper deputa-
tion.]—A judgment must be proved by an examined copy, and so also a writ, although it is in the same cause and in the same Court. There is no case in which the affidavit is put in issue in which it must not be proved by an examined copy. In *Casburn v. Reid (a)*, it is stated in the marginal note, that an office copy was admitted; but it is plain, from reading the case, that it was an examined copy. The meaning of Lord Mansfield was, that where there is no dispute about a particular document, it may be admitted in evidence in the same cause, and in the same Court. The statute 1 & 2 G. 4, c. 53, leaves this question precisely as it was; it was merely passed to regulate the office, and not to give any higher authority to documents out of it. As to the Assize Court, being the Court out of which the writ issued, that position cannot be sus-
tained, for the Judge of Assize sits by virtue of a commission. There is no difference between a judgment and this affidavit; and that the

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(a) 2 B. Moo. 60.

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record was tried by a Judge out of this Court was merely accidental. The service of the ejectment is an essential part of the lessor's title, and is substituted for the demand at common law, and positive proof ought to be given in respect to it.

Mr. *Napier* replied.—The practice which has existed cannot alter the law upon this subject. These copies were made by the Officer under the 1 & 2 G. 4, c. 53, in this Court, and in this ejectment, and are clearly within the rule in *Denn v. Fulford*; and that rule is approved of and carried down by Lord Ellenborough in *Duncan v. Scott* (a), and by Mr. Justice Littledale in *Highfield v. Peake* (b), and by *Phillips, Starkie, Roscoe, and Peake*, in their Treatises on Evidence. An office copy is sufficient evidence of a rule of Court. *Still v. Halford* (c). The statute under which this Officer acts, especially the 24th section, is conclusive upon the question, and brings it exactly within the principle in 3 *Bac. Abr.* tit. *Ev. L. F.* 251, where he states the difference between a copy authenticated by a person entrusted to that purpose; and he adds, that in such a case the copy is evidence; and a copy given out by the Officer of the Court that is not trusted to that purpose, which he says is not evidence, without proving it actually examined. By the act under which the Officer is appointed, who made out the copies in the present case, he is entrusted for this purpose, and he is made responsible in a penalty of £20 for the accuracy of every copy so made in his office, and for the same being duly compared with the original from which it shall be made. Where the law imposes a duty upon a person, the Court will presume that he performs that duty. In *Williams v. East India Company* (d), Lord Ellenborough cites from *Viner* the following passage:—"A person shall be presumed duly to execute his office until the contrary appears;" and that principle was adopted in *Gleadon v. Atkin* (e), where Bayley, J., said, "The law never presumes illegality;" and in *Kinnersley v. Orpe* (f). That the *Nisi Prius* Court is the Court out of which the record issues, is established in *Rex v. Jolliffe* (g), *Rex v. Read* (h), *Dyer v. Hainsworth* (i), and *Highfield v. Peake*; and it is manifest that it is so, from the fact, that all the proceedings must be conformable to the rules of the Court above, which controls and regulates the proceeding in the Assize Court.

Tuesday, May 5th.

BUSHE, C. J.

This was an ejectment for non-payment, and came before the Court

(a) 1 Camp. 102.

(c) 4 Camp. 17.

(e) 1 C. & Mee. 418.

(g) 4 T. R. 285.

(b) 1 Moo. & M. 109.

(d) 3 East, 200.

(f) 1 Doug. 56.

(h) 16 East, 405.

(i) 3 T. R. 615.

upon points reserved by my Brother BURTON. One only of these points has been pressed upon the consideration of the Court, and that is the objection to the admission of the certificate by the Officer of the comparison of an attested copy of the summons in ejectment, and the affidavit of service thereof, it being alleged that it ought to be proved to have been examined and compared. It was not disputed, that in an ejectment for non-payment of rent, the attested copy of the affidavit is sufficient; but the objection rested altogether upon the absence of proof that it had been compared. The document is signed by our Officer, the Filacer, and upon the back of it the word "compared" is written; and the nature of his duties are pointed out in the sections of the 1 & 2 G. 4, c. 52, which have been referred to in the argument. In common with the other Officers, he is not only responsible for the accuracy of the copies which he delivers out of his office, but he is forbidden, under a penalty of £20, to cause or permit any copy to be made contrary to that statute. It seems, therefore, very reasonable, that when a copy like the present is given in evidence, made in the progress of a cause in this Court, in the same cause, that the attestation of our Filacer should be legal evidence of that document; *Denn d. Lucas v. Fulford* is an authority for that position. It therefore only remains to see whether the production of this document in a *Nisi Prius* Court is within the rule. That the Judge who tried this case was a member of this Court must not be taken as any more than accidental; but the judgment of Buller, J., in *Rex v. Joliffe*, removes all difficulty upon the subject.

Rule discharged.

Thursday, May 7th.

Mr. Napier applied in this case that the *postea* be forthwith delivered to the plaintiff. The Officer refused to give anything but a four-day rule for judgment, which, Mr. Napier submitted, was not necessary after the Court gives judgment upon a motion to have a non-suit entered, or for a new trial.

Per Curiam (after conferring with the Officer).—The practice of the office has been to grant only a four-day rule at first; we will, however, grant your application.*

* There does not appear to be any ground for the objection of the Officer in this case. It would be different if the four sitting days allowed to the unsuccessful party to move in arrest of judgment had not expired, or if the conditional

order for the non-suit had contained a reservation for liberty to move in arrest of judgment, in case the non-suit was refused; but it seems to be otherwise where that is not done. 1 *Archb. Pr. by Chitty*, 331.

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Monday, April 27th.

**NOTICE OF MOTION—PRACTICE—DEMURRER BOOKS—
JUDGMENT FOR WANT OF.**

ROCHE v. HACKETT.

Where a party applies for judgment on the ground that his opponent has neglected to supply his portion of the demurrer books—*Held*, that notice must be given of such application.

Mr. ORPEN stated that in this case a *scire facias* had issued to revive a judgment. The defendant pleaded in abatement, and to this plea the plaintiff demurred. He now applied for judgment, the defendant not having supplied his portion of the books.

PERRIN, J. required some document to shew that the defendant had not done so, or that notice of this motion should be served upon him. His Lordship directed the motion to stand, and that the latter course should be taken.

Tuesday, April 28th.

**PRACTICE—TIME—CLEAR DAYS—CONSTRUCTION OF
STATUTE.**

THE QUEEN v. SWEENEY.

Where a statute provided that notice of an appeal should be given to the adverse party "within one week at least" before such appeal was to be heard—*Held*, that notice given on the 22d for the 29th of same month was insufficient.

In this case, a *certiorari* had been obtained, and a return made thereto, by which it appeared that this was an information for breach of the Excise Laws, under the 7 & 8 G. 4, c. 53., before certain Magistrates, who dismissed the complaint. There was then an appeal to the Quarter Sessions, but that Court also dismissed the case, not thinking the notice of appeal sufficient. The notice of the hearing of the appeal was given on the 22d for the 29th of same month.

Mr. Tomb applied to have the order of dismissal quashed, and the case sent back for adjudication at the Quarter Sessions.

Mr. Napier, *contra*, contended that there should have been a clear week's notice given under the 83d section of the statute;* seven clear

* That section provides that no such appeal shall be allowed, unless the party appellant shall, immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the Commissioners of Excise or Justices of the Peace from whose judgment such appeal shall be made, and also to the adverse par-

days excludes the day of the service of the notice of the appeal. *Zouch v. Empey (a)*.

The Court concurred with Mr. Napier, and refused the application.
Motion refused.

(a) 4 B. & A. 522.

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Thursday, April 30th.

PRACTICE—AMENDMENT—BILL OF EXCEPTIONS— RULES OF COURT.

Lessee of *DAWSON v. BELL*.

THIS was an application to extend the time for filing the bill of exceptions in this case. It appeared from the affidavit of the plaintiff's attorney, that this case, which was an ejectment on the title, was first tried at the Londonderry Assizes for Spring, 1836, and a verdict for the plaintiff, subject to certain objections, upon the argument of which the Court granted a new trial; that the case was again tried at the Summer Assizes for 1837, and a verdict for the defendant, to which exceptions were taken. The bill of exceptions was served on defendant's attorney, but, by consents entered into between the parties, the time for filing said bill of exceptions was enlarged until after the 6th of April, 1838; that upon that day the late attorney of the plaintiff called upon the defendant's attorney, by notice, to return said bill, but that same remained with him, notwithstanding said notice, until the death of plaintiff's said late attorney, which took place about July 1838; that in consequence of the death of said attorney, no further steps were taken until plaintiff was served with an order that defendant should have liberty to proceed, giving a Term's notice, which notice could not have expired until the last day of Michaelmas Term. It was then stated that the plaintiff's present attorney having been appointed, served a draft bill of exceptions upon the defendant's attorney, who returned same, and having, after two summonses to settle them, required certain documents to be set forth, which the Judge allowed upon the 25th

The Court with great reluctance allowed time for filing a bill of exceptions where the trial had taken place more than two years before, although the parties had by consents between them, extended the time until within a few days of this Term.

Parties cannot by consent vary the four-day rule without making the consent a rule of Court.

ty; "and no such appeal as aforesaid shall be heard, unless the party or parties appellant shall, within one week at least before such appeal is to be finally ad-

"judged and determined, give notice in writing to the adverse party or parties on such appeal, of the time and place where such appeal is to be heard."

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January, 1840. In procuring these, considerable delay having taken place in consequence of the death of the plaintiff's former attorney, he did, on on the 16th of April, 1840, serve a new draft of the bill of exceptions upon the defendant's attorney, a rule for judgment having been served upon him that day by defendant's attorney; that upon the 21st of April he waited upon the defendant's attorney for said draft, when he was informed by said attorney that he had not laid same before counsel, but that he would see counsel that night, and return the draft in the morning; that upon the 22d of April, said attorney told him he had laid same before counsel, and that he believed he approved of same, and that he would send it back that day; that in about an hour after he sent deponent word that he was advised by counsel not to receive said bill of exceptions, but to proceed to mark judgment. It appeared that upon the 11th of April, 1840, the defendant served notice that he would mark judgment in the ensuing Term.

Mr. *Keatinge*, Q. C., submitted, that upon the foregoing facts his client was entitled to have the time for filing the exceptions enlarged, and that if the Court refused the present application the plaintiff would be without remedy, as the statute of limitations would bar his right.

Mr. *John Brooke*, Q. C. — This bill of exceptions ought to have been filed within the four first days of Michaelmas Term, 1837, in accordance with the 66th Rule of this Court. Parties by consents cannot vary the rule of the Court. In the case of *Lloyd v. Kirkwood* (a), the Court extended the time for a few days, on account of the illness of the senior counsel, and would not have done so but for that circumstance, although there was a consent in that case. Independent of former *laches*, the plaintiff has been so remiss since the 25th of January last, that that alone is sufficient to prevent the Court from granting the present application. The four-day rule extends to bills of exceptions. *Hill v. Watts* (b).


Mr. *Boyd* replied, and contended that both parties acquiesced in all the delay that had occurred until the 11th of April last, and we were then entitled to four days in the ensuing Term; and but for the conversation which had occurred between the parties upon the 22d, a motion might have been made to enlarge the time. The consents in this case were made rules of Court.

BURTON, J., said he yielded to the present application with great

(a) 1 Jebb & S. 499.

(b) 1 AL. & N. 130.

reluctance, because it was breaking in upon the rules of the Court, which were made for the convenience of the suitors of the Court as well as of the Court itself; and that the consequence of attending to applications like the present would be to render them much more frequent. The proposition in this case is a startling one, and if admitted generally, I do not know where we could stop. However, the circumstances of the present case are peculiar: a great length of time has been allowed by both parties to elapse, and the consents entered into were made rules of this Court, and thus the proceedings brought down to this very Term, infringing upon the very rule which regulates these proceedings; and the violation of that rule, as respects this Term, seems to have arisen from the way both parties have acted for so long a time.

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CRAMPTON, J., concurred in the rule with great hesitation and difficulty, from an apprehension that this case might be used as a precedent for future applications of this kind. There can be no doubt that the rule of the Court cannot be dispensed with without the order of this Court; and the hands of the party are not bound up by that rule, for the plaintiff might have come in, and, upon a proper case, have the time enlarged, which is a practice of constant occurrence. Had the plaintiff not taken any step, I, for one, would say, that this rule could not be relaxed; but my judgment is founded upon the distinct impression upon my mind, that if the plaintiff's attorney had not been misled by the conversations he had with the defendant's attorney upon the 21st and 22d of April, that he would have come in and obtained an order to extend the time; and this impression enables me to concur in the rule for the purposes of justice. I am the more led to this by the statement of counsel, that if we decide the present motion against the plaintiff, he will be altogether barred of relief. To mark our censure of this application, the plaintiff must pay the costs of this motion.

PERRIN, J., concurred in the rule.—The four-day rule is one of great convenience to parties; but I consider this motion as made upon the 24th. The plaintiff's attorney might have supposed, upon the 22d, that he would have been quite ready to have brought in the bill of exceptions upon that day, or, if necessary, obtain further time for filing them.

Let the said lessor of the plaintiff have one week's time to bring in and file the bill of exceptions in this cause, and let said lessor of the plaintiff pay to the defendant the costs of this motion.

Saturday, May 9th, and Wednesday, May 13th.

PRACTICE—AMENDMENT—DECLARATION—AFTER A
PEREMPTORY UNDERTAKING.

HUGHES v. PARKER, administrator of EGAN.

On motion to amend a declaration by averring notice of dishonor of a bill of exchange to the personal representative of A. instead of to A., which had been done in the declaration; it appeared that the declaration was filed as of Michaelmas Term 1839, that the defendant pleaded and issue was joined in due course, and that no further proceedings having been taken by the plaintiff, at the beginning of this Term the defendant applied for judgment as in case of non-suit, which was met upon the part of the plaintiff by a peremptory undertaking to go to trial; that in advising proofs the mistake was discovered which it was now sought to remedy, but the Court considered the application was too late, and refused the motion with costs.

MR. MONAHAN, Q. C., moved to amend the declaration in this cause, by averring notice of dishonor of the bills of exchange to the defendant instead of to Thomas Egan the testator. This is an action of *assumpsit* brought by the plaintiff against the defendant, as personal representative of Thomas Egan, who was the drawer of two bills of exchange for £46 each, which were protested for non-payment. The declaration was filed on the 9th of February 1839, as of the Michaelmas Term preceding. To this declaration the defendant pleaded "*non-assumpsit*" and "*plene administravit*." A replication was filed in due course, joining issue on the plea of *non-assumpsit*, and praying judgment of future assets. Nothing further was done in the cause, as it was discovered that the defendant had no assets to administer, and in fact was never likely to have any. However, in the beginning of the present Term the defendant applied to the Court, three Terms having elapsed since issue joined, for leave to enter up judgment as in case of a non-suit. We met his application by a peremptory undertaking to go to trial at the Sittings after the present Term. In advising proofs, it was discovered that Egan had in fact died before the bills fell due, and that of course notice of their dishonor was not given to him as was averred in the declaration, but that notice was given to defendant as his personal representative. Under these circumstances it becomes necessary to make the present application. As there are no assets, and no likelihood of any, the contest here can only be for costs. Under such circumstances, and where it is a mere oversight, the Court will always give leave to amend on just and proper terms, at any time before the record is made up. We do not seek to introduce any new cause of action, although even that has been allowed, and we are willing to submit to any terms the Court should think reasonable. In *Cope v. Marshall* (a), which will be relied on upon the other side, one of the Judges thought it a very strict and severe construction of the statute to refuse an amendment of a mistake after a peremptory undertaking, on the grounds that such mistake could not be considered just cause for not proceeding to trial. And in fact in several subsequent cases, such amendments have been allowed, particularly in the case of *Billing v. Flight* (b), in which a much more important amendment, namely, changing the form of action from *assumpsit* to debt, after six Terms, was allowed.

(a) Sayer, 234.

(b) 6 Taunt. 419; 2 Marsh. 124.

Mr. B. Stephens, *contra*.—The plaintiff is not entitled to this amendment. Independent of the peremptory undertaking, the rule formerly was, and with very few exceptions still is, that after two Terms no substantial amendment shall be allowed which tends to vary the cause of action altogether, as by adding a new count, *Auber v. Barker* (a), a new right of action, *Cope v. Marshall* (b); or which would charge a party not otherwise chargeable, as in the case of *Levett v. Kibblewhite* (c). The principle of the rule is this, that the plaintiff must declare in two Terms or be *non-prossed*; if, therefore, his declaration be wholly insufficient to charge the defendant (as is the case here), after two Terms he shall not be allowed to make such an amendment as would render it sufficient for that purpose, as that would be allowing the defendant in effect to declare after the two Terms, and we have applied for a judgment of non-suit. The only exceptions to the general rule appears to be (which does not hold in the present case), where the action would be otherwise lost, as in consequence of the operation of the statutes of limitations; *Duchess of Marlborough v. Widmore* (d); *Tenowe v. Smith* (e). The plaintiff does not seek to amend that of which he should have been aware from the beginning, until after giving a peremptory undertaking to go to trial. Where a peremptory undertaking is once given, no amendment is afterwards allowed, except it becomes necessary in consequence of something arising subsequent to the undertaking. This appears from the case of *Billing v. Pooley* (f). The case of *Billing v. Flight*, cited by Mr. Monahan, has been, if not overruled, at least fully explained away by the subsequent case of *Green v. Mitton* (g), where an amendment after a peremptory undertaking was refused. Lord Denman in his judgment alludes to *Billing v. Flight*, and meets the assumed authority of that case by saying, it was decided under very particular circumstances. For the case now before the Court, as the declaration stands, we conceive we are not and cannot be chargeable in the action. By the amendment now sought we might become chargeable; that amendment is applied for after plea and replication, after a lapse of upwards of a year since issue joined; and above all, after a peremptory undertaking to go to trial. What might be the effect, if since our plea of *plene administravit* (upon which they have prayed judgment), any assets had come in, and the defendant relying on the insufficiency of their declaration had applied such assets in payment of legacies? He might be held personally liable as for a *prossavit* in case he had really no defence to the declaration in its amended shape. A similar application to the present was refused in the Court of Common Pleas in this country, as appears by the case of *Meredith v. Taylor* (h).

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(a) 1 Wils. 149.

(c) 6 Taunt. 483; S. C. 2 Marsh. 185.

(e) 1 Keny. 141.

(g) 4 B. & Ad. 369.

(b) Sayer, 234.

(d) 2 Str. 890.

(f) 6 Taunt. 423.

(h) 1 C. & Dix. 615.

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Mr. *Monahan* replied.

BURTON, J.—The Court are of opinion, upon all the circumstances of this case, that the application must be refused. The General Rule which has been established is one of very great importance, and the greatest urgency, if not necessity, ought to be shewn before the Court would sanction a departure from it. I will not say that cases may not arise, and the case of *Billing v. Flight* shew that such cases may occur, as will induce the Courts to dispense with that Rule; but I cannot concur with Mr. *Monahan* that the present comes up to that case. What we have heard from Mr. *Stephens* has left no doubt on my mind that we ought to refuse this motion.

CRAMPTON, J.—This application is made too late, and in addition to that, a party who gives a peremptory undertaking to go to trial should be quite sure that he was ready for any emergency or necessity that might arise. The present motion is made to remove a doubt which counsel entertains that there may be a variance at the trial.

PERRIN, J.

The General Rule is not to allow an amendment after a peremptory undertaking to go to trial, and there is nothing in the present case to take it out of that Rule.

Motion refused with costs.

Wednesday, May 6th.

PRACTICE—MARKING JUDGMENT—POINTS OF DEMURRER NOT BEING FURNISHED.

WILLNE v. O'CONNOR.

The Court will allow a party to mark judgment, where his adversary has taken a demurrer and has neglected to furnish the the points to be argued although called upon to do so, notice of this motion having been given.

MR. LEAHY applied for liberty on behalf of the plaintiff to mark judgment in this case, the defendant not having furnished the Officer with the points of demurrer to be argued. The plaintiff had paid his portion of the expense of paper books on the 31st of January, and called upon the defendant's attorney to furnish the points of demurrer to be argued, or that he would apply for liberty to mark judgment. Upon the 6th of May, there not being any compliance with the former notice, a notice of this motion was served upon the attorney for the defendant.

THE COURT granted the application, after inquiring whether notice of this motion was duly served.

Motion granted.

Saturday, May 9th.

**PRACTICE—TAXATION OF COSTS—WHERE ONE-SIXTH
STRUCK OFF AND COSTS OF TAXATION NOT
ALLOWED.**

HAMILTON, BALL and NORTON, Attornies, v. Sir GEORGE GOULD, Bart.

SERGEANT GREENE shewed cause why a conditional order to confirm the Prothonotary's report should not be made absolute. The report was made under an order of the 10th of June 1836, referring the bills of costs, for the recovery of which the action was brought for taxation, and also referring it to the Prothonotary to take an account of the credits to which the defendant was entitled. Objections were made to the report, involving matters of account between the parties, which were now discussed, and the Court confirmed the report. Serjeant *Greene* then applied on behalf of the defendant for the costs of the taxation, on the ground that more than one-sixth had been taken off the bills of costs on the taxation of them.

Messrs. *Smith, Q. C.*, and *Hans H. Hamilton* opposed this on behalf of the plaintiffs.—The defendant had allowed more than one month to elapse after the delivery of the bills of costs without taking any step to settle them, and the plaintiffs were obliged to commence an action against him, and in such case the defendant is not entitled to the costs of taxation, even though more than one-sixth is taken off. 1 *Arch. Pr. by Chitty*, 88, 89, the cases there cited, *Harbin v. Miles (a)*; *Jay v. Coaks (b)*; *Benton v. Bullard (c)*. Neither party gets his costs of taxation in such cases; the attorney cannot get them because one-sixth is taxed off his costs, nor can the client, as he has not availed himself of the month allowed him by the act of parliament to apply for the taxation of the costs before any action could be brought,—7 *G. 2, c. 14, s. 9, Ir.*, 2 *G. 2, c. 23, s. 23, Eng.*

Where an attorney delivered his bill of costs a month before action brought, and after action brought the client obtained an order to have the bill taxed, and more than one-sixth was struck off in taxation, this Court considered itself bound by the practice of the Court of Queen's Bench in England, not to give the client the costs of taxation, it not appearing that there was any settled practice in this Court, although they might decide differently if it were *res nova*.

Mr. Scully for the defendant, submitted that the rule laid down by the cases cited was unreasonable and contrary to the act. It was so considered in *Ex-parte Watts (d)*.

PERRIN, J.—Is there any practice established in this Court on the subject? [It not appearing that there was any established practice,]

(a) 9 B. & C. 755.

(c) 4 Bing. 561.

(i) 8 B. & C. 635.

(d) 1 Deacon B. C. 588.

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BURTON, J., said that he for one would be unwilling to depart from the established practice in the Queen's Bench in England, though the act would probably lead him to a contrary conclusion if it were *res nova*.

THE COURT gave no decision on the subject, as it turned out that the defendant had not served any notice of applying for the costs of taxation.*

* The Court of Review decided the case of *Ex parte Watts* upon the practice of the Bankruptcy Court, but did not question or affect to interfere with the practice of the Court of Queen's Bench.

Saturday, May 9th.

PRACTICE—CHANGING VENUE—COMMON AFFIDAVIT.

ANONYMOUS.

The common affidavit to change the venue is informal in not stating in express terms that the cause of action did not arise in the county in which the venue is laid; and also in introducing any thing beyond the usual form as to the place where the cause of action arose.

MR. GARVEY applied for an order to change the venue in this case from the county of —— to the county of Mayo. The affidavit stated the circumstances of the parties, and proceeded to state "that the cause of action, if any, arose in the county of Mayo, and not out of the county of Mayo or elsewhere."

Per Curiam.

Your affidavit is defective in its statement of the place in which the cause of action arose, and it is also irregular in introducing the circumstances of the parties, or anything beyond the common form.

Motion refused.*

* The proper form of the "usual affidavit" to change the venue is, "that the plaintiff's cause of action (if any) arose in the county of B. and not in the county of A." (where the action is brought) "or elsewhere out of the county of B." 2 *Arch. Pr.* by Chitty, 726. See also 4 *Stewart's Forms*, 1371, and *Cahill v. Hayes*, K. B. Hil. 1826. *ibid.* 1373.

Saturday, May 9th.

PRACTICE—REVIVING JUDGMENT—AFFIDAVIT.

CRENIM v. STEPHENSON.

MR. JENNINGS applied for a *scire facias* to revive a judgment in this case; the judgment was of Trinity Term 1820, and the affidavit stated that payments of interest had been made to a recent date, but did not state by whom they had been made.

Upon motion for liberty to issue a *sci. fa.* to revive a judgment nearly twenty years old, the affidavit must state by whom payments of interest have been made.

PERRIN, J., said such statement was required by the practice of the Court when the judgment was nearly twenty years old.

No rule.

Saturday, May 9th.

PRACTICE—BILL OF PARTICULARS—COSTS OF MOTION FOR.

EARL OF O'NEILL v. ORR.

MR. TOMS applied in this case for an order upon the plaintiff's attorney for a bill of particulars, and for the costs of this application. It did not appear that the defendant had made any application for these particulars before the motion. The action was for use and occupation, and the declaration contained the money counts.

Where the plaintiff does not furnish a bill of particulars the defendant may move at once for them without making any application to the plaintiff, and he will be entitled to the costs of the motion.

PERRIN, J., said he was entitled to this order, and the costs of the application.

Motion granted.

Monday, April 27th.

**EXCISE LAWS—GROCEER AND PUBLICAN—
CONSTRUCTION OF STATUTE.**

THE QUEEN at the relation of BOLAND v. COMMISSIONERS OF EXCISE.

THIS was an application for a *mandamus* to compel the Commissioners of Excise to give the prosecutor a license for selling tea, &c., she having

A person who is already a licensed publican is not entitled to a

grocer's license since the passing of the 6, 7, W. 4, c. 38.

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been at that time a licensed publican. The entire question in the case was, whether the same person was entitled to have at the same time, and for the same premises, licenses to carry on the trades of publican and grocer? A conditional order had been obtained on a former day, against which

The *Attorney-General* (Mr. *Brady*), with whom were Messrs. *Blacker*, Q. C., and *Tomb*, now shewed cause.

The question in this case arises upon the construction of the 6, 7 *W. 4*, c. 38, s. 3,* which was passed to amend the 3, 4, *W. 4*, c. 68; the operation of that section was suspended by 6, 7, *W. 4*, c. 72, until after the end of the next Session, but it is now in full force whatever its construction may be; and the plain and obvious meaning of that section is this, that the same person is not to carry on in the same place these two trades. It has been the policy of the law, for a long time, to keep these trades distinct; the 32 *G. 3*, c. 19, s. 3, and 45 *G. 3*, c. 50, s. 19, contain provisions similar to the present act; the 6 *G. 4*, c. 81, s. 4, the general licensing act, allowed the grocer to retail any quantity not exceeding two quarts, and that quantity is reduced by the present act to not less than a pint. The Court will construe these acts against parties seeking to evade them, and in such a way as to remedy the mischief they were intended to prevent; *Rex v. Commissioners of Excise (a)*, which was a case somewhat like the present, and in which all the Judges laid down that doctrine.

Messrs. *Smith*, Q. C., and *Napier*, *contra*.—At common law there was no right to prevent the exercise of any trade unless it amounted to a public nuisance; this was altered with respect to some trades by statutable enactments for this purpose; and with respect to publicans, the legislature by the statute rendered the sanction of Magistrates necessary, but this enactment did not refer to grocers, the legislative enactments with respect to them being merely fiscal; this is the main distinction between these two trades. It lies upon our opponents to shew that there is a statutable disqualification to our client exercising the trade of a grocer; they say it exists under the 3, 4 *W. 4*; but it might be enough to say that every thing of this sort is calculated to create what

(a) 2 T. R. 381, 385.

* 6, 7 *W. 4*, c. 38, enacts that "No person in Ireland who shall be duly licensed to sell coffee, tea, &c., nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland at or immediately before the passing of this act, shall be entitled to take out any license to retail spirits in the house or on the premises of such retailer, or in any house, or on any premises within one quarter of a mile of the house or premises of such retailer, other than a license to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer," otherwise the license shall be null and void.

the common law detests, monopoly; and there being no language which says the publican shall not get the tea license, they can only contend that this disqualification is given by implication and not by express enactment; but the rule as regards intendment and presumption does not apply to an enactment which controls a common law right, and they are, therefore, out of Court upon all the authorities; *Cockburne v. Harvey* (a); *Rex v. Poor Law Commissioners* (b); *Hubbard v. Johnstone* (c).—[CRAMPTON, J., referred to *Nash v. Limerick Bridge Commissioners* (d).]—There are two distinct classes of spirit licenses;—first, the publican's license,—secondly, the grocer's license; the second was first given by the 47 G. 3, Sess. 2, c. 12, s. 14, the other was given long antecedently. All the acts before the 45 G. 3, c. 50, are annual acts, and previous to that act the retail license was only given to victuallers or coffee sellers; the disqualification affected every other person. The last act is a good *terminus* from which to get at the meaning of the several statutes on this subject; it repeals the former acts, and thereby removes all the disqualifications created thereby, and the common law right of the subject existed in its full extent, except so far as it was restricted by that statute. The 19th section is the disqualifying clause of the statute, and at that time the only disabling enactment; and amongst the particular classes who could not have a license for selling spirits "grocers" are enumerated, and if that clause is not repealed, we cannot succeed. The 47 G. 3, Sess. 2, c. 12, s. 14, contains the first enabling clause, and under it "grocers" were for the first time by statute allowed to sell spirits; the 19th section of the 45 G. 3, was then in force, and prohibited grocers from getting the publican's license, but this act gave to the grocers a spirit license *sui generis*. Then came the 58 G. 3, c. 57; at the time of the passing of this act the grocer might obtain the retail license under the former act, but could not obtain the publican's license; this statute recites the disabling enactment in the 19th section of the 45 G. 3, c. 50, and so far as it applies to grocers repeals it, and restores the grocer to his capacity at common law to apply for a publican's license: the 2d section contains what may be called the second enabling clause, and extended the privilege of the grocers as to the place in which, and the quantity in which he might retail spirits; and under this act the grocer had two rights,—first, his right at common law to apply for the publican's license; and, secondly, his right under the statute to apply for the grocer's retail license; and it cannot be contended that the giving the latter took away the former, because affirmative words cannot take away a common law right. The schedule in the 2d section of the 6 G. 4, c. 81, clearly shews that the legislature contemplated that grocers might

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(a) 2 B. & Ad. 800.

(c) 3 Taunt. 220.

(b) 1 Nev. & P. 375, 393.

(d) 1 Jebb. & S. 273.

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sell spirits upon the premises, for it says "Every retailer in spirits "being licensed to vend coffee, &c., and not selling spirits in any "greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer," &c.; and the 4th section of that statute is the next enabling clause in respect to grocers, allowing them to sell any quantity not exceeding two quarts, to be consumed off the premises; the 3, 4 *W. 4*, c. 68, consolidated and remodelled the former provisions; the 13th section of that statute adopts the phraseology of the 19th section of the 45 *G. 3*, merely omitting some trades therein specified and inserting others, and the word grocer does not occur in it; why not adopt the disabling words with respect to grocer? Manifestly, because it was not intended to disqualify him. The 4, 5 *W. 4*, c. 75, s. 8, confirms this view, for it provides that no additional duty shall be imposed upon any license to retail spirits to be taken out by any person licensed to sell coffee, &c., "and not selling spirits to "be consumed in the premises of such retailer," clearly contemplating that grocers might sell spirits in this way. Therefore, up to the 6, 7 *W. 4*, c. 38, it is plain that grocers might sell spirits under the publican's license, and if we are right as to the law previous to that act, it cannot defeat the right of the grocer. If the construction contended for on the other side be right, the moment our client takes the license for the sale of tea, the license for the sale of spirits is void. *Milwood v. Thacker* (a). Upon the authorities already cited, it is sufficient to say that the language of the act which it is insisted disqualifies a publican from his right to the grocer's license, does not expressly meet this case; and that in order to take away a common law right the language must be express and unambiguous. We seek to have this case put upon the record, and in the case of *Rex v. Costello* in this Court in 1834, the Court granted the *mandamus*, saying that the prosecutor would be in a more favorable position for trying his right.

Mr. *Blacker*, Q. C., replied.

Wednesday, May 13th.

BUSHE, C. J.

In this case a conditional rule for a *mandamus* had been obtained to compel the Commissioners of Excise to grant a grocer's license to a person who is already a licensed publican, and against this rule the *Attorney-General* shewed cause. The question which remains for the Court to consider is, whether a licensed publican is of right entitled to a grocer's license? The question turns upon the construction of the third section of 6, 7 *W. 4*, c. 38.—[Reads it.] In the course of the argument it was suggested, that although that section may prohibit the granting

a publican's license to a grocer, yet that it does not prohibit a publican obtaining a grocer's license; but that argument was given up because the adoption of that construction would be altogether against the plain intention of the legislature; for if such were the construction, it would be only necessary to take out a publican's license first, and then the grocer's license; whereas the manifest object of the legislature was to prevent the same person having these two licenses. The intention of the legislature is manifest from the 6, 7 W. 4, c. 72, an act passed almost contemporaneously with the act upon which the present question arises, and which, we think, altogether removes the difficulty of construing the latter act. It was then contended that it was the deliberate intention of the legislature to make an exception in favor of licensed grocers, the reason of which has long since expired. We consider the language of the 6, 7 W. 4, c. 38, is far too strong to admit of any doubt upon this subject; it refuses to grocers any license other than in that statute, and makes any other null and void. Upon these grounds we must allow the cause shewn.

Rule discharged.

Wednesday, May 6th.

**PRACTICE—EJECTMENT—SECURITY FOR COSTS, &c.,
UNDER 1 G. 4, c. 87—FORM OF CONDITIONAL ORDER.**

Lessee of ORPEN v. The Casual Ejector.

A CONDITIONAL order had been obtained on a former day, which stated that "upon hearing the declaration in ejectment in this cause, summons "and notice under the statute (1 G. 4, c. 87), affidavit of service thereof, "notice on tenants of the 23d March last, to surrender possession, "joint affidavit of Thomas Keane and Patrick Leanny and affidavit of "C. E. H. Orpen read," it was ordered that they should enter into the terms prescribed by the statute upon their being admitted defendants. The affidavit of Mr. Orpen stated, that by indenture bearing date the 19th of February 1791, Conolly Coane demised to James Quinn the lands for which the ejectment was brought for the life of James Quinn, and for 41 years, to commence from the day of the death of the said James Quinn; that in March 1799, the said James Quinn died, as deponent believed; that the interest of Quinn became vested in R. and F. Fitzgerald, who by deed of the 23d of June 1812, under their hands and seals

Where a tenant held under a lease for one life and forty-one years, to commence from the death of the *cestui que vie*, and by a subsequent deed the parties agreed that the *cestui que vie* died upon a certain day, an ejectment having been brought against the tenant under the 1 G. 4, c. 87, and a conditional order

obtained, requiring the tenant to enter into the terms by that act prescribed, before being admitted to take defence, it was insisted as cause that the term was uncertain and that the order was irregular in not stating that the deeds under which the tenants held were produced when it was obtained, the Court refused to make the order absolute.

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did admit the death of said Quinn, and covenanted with Coane that they were only entitled to hold said lands for and during the term of 41 years from the 25th of March 1799, and no longer; and that said indentures of 1791 and 1812 were then in deponent's possession, ready to be produced. There was also an affidavit from Terence Hughes, one of the tenants in possession, which stated he was advised and believed that his tenancy to the lands had not expired, but that he still continued a tenant of said lands, and should not be treated as an overholding tenant.

Mr. *R. C. Walker* relied upon the uncertainty of the term demised by the lease; that the *terminus a quo* the term commenced was dependant upon a life, whereas under the statute the term should be certain from its commencement. The conditional order is irregular, in not stating that the lease was produced at the time the order was obtained.

Mr. *Napier, contra*.—The object of the statute is to meet the cases of tenants who know the period of the expiration of their terms either by their lease, or where the term therein is made certain.—[CRAMPTON, J. The statute does not say "made certain," but where the tenant holds for "any term certain," that means certain from the commencement.]—The parties by deed agree that the *cestui que vie* died on a certain day, and they were only to hold for 41 years from his death.—[CRAMPTON, J. If that deed amounted to a new lease I could understand your argument.]—It would operate as a surrender.—[PERRIN, J. The defendants offer to give you security for costs; and there is a question upon your order, for not inserting that the documents under which the tenants hold were produced when it was obtained.]—In *Lessee of Flynn v. Casual Ejector (a)*, Mr. Justice CRAMPTON said he would make the rule absolute, because there was no affidavit shewing that there was something to try; in this case there is no such affidavit, and the merits are all with us.—[CRAMPTON, J. Your merits may be very good, but there are legal difficulties in the way.]

BUSHE, C. J.

There is a doubt upon the Bench as to the form of your conditional order, and the present case shews the necessity of stating in your order the document upon which it is obtained, because here it is uncertain under which document the tenant holds.

Let the said Terence Hughes give security for costs and mesne rates, and the rule as to giving judgment as of this Term to be discharged without costs; and no costs of this motion.

(a) 1 Ir. Law R. 73.

Saturday, May 9th.

**EJECTMENT ON THE TITLE—NOTICE TO QUIT—
DEMAND OF POSSESSION.**

Lessee of JOHN BAGWELL and others v. JOHN BOLAND.

EJECTMENT on the title.—This case was tried before CHAMPTON, J., at the Clonmel Spring Assizes 1840. The lessee of the plaintiffs at the trial produced a lease made by his grandfather John Bagwell to Oliver Carlton, and for the lives of the lessee, Francis Carlton his brother, and Ponsonby Watts; this lease was dated the 2d May 1775. He proved also receipt of the rent reserved by the lease by his agent Mr. Douglas for some time previously, and up to the year 1833 from Mr. James Shea as the agent of Mrs. Ryan, who was not herself in possession of the lands claimed in the ejectment, nor shewn to be connected with the lease of 1775 otherwise than by Mr. Shea's paying rent for the lands in her name, in amount the same as that reserved by the lease. The lessee of the plaintiff further proved the expiration of the lease by the death of Ponsonby Watts, the surviving *cestui que vie* in 1836, and and that he was the surviving grandson and heir-at-law of the lessor. It appeared from Mr. Douglas's cross-examination that the defendant and some others were in possession of the lands for several years,—that he never received rent from the defendant; but that in the August preceding the trial a distress for rent had been made upon the lands by Stephen Pepper, the under agent of the lessor of the plaintiff; that nothing had been levied under that distress, it having been abandoned; that the abandoning of the distress was, as he heard from Pepper, on account of an informality; that this distress was made subsequently to his hearing of the death of Ponsonby Watts, the last life on the lease which he heard of, as he best recollected, about four years before the trial; that he was acting as agent for Mr. Bagwell's family and himself for about twenty-eight years. The plaintiff here closed his case;—the defendant's counsel called upon the learned Judge for a non-suit, on the ground that there was no evidence to go to the jury shewing any connexion of the defendant with the lease of 1775, and, therefore, none to shew that the defendant's right of possession determined on the expiration of that lease; that the receipt of rent from a person not in possession, after such a lapse of time since the making of the lease was not, though accidentally the same in amount as that reserved in the lease, in itself any evidence of such connexion; but even if it were, yet that the lessor of the plaintiff having permitted the defendant to remain in possession for more than three

In ejectment on the title, the plaintiff proved a lease of 1775, made by his grand-father, and receipt of the rent reserved thereby from R., for some time previously, and up to 1833, R. not being in possession nor shewn to be connected with the lease of 1775 otherwise than by payment of rent in amount the same as that reserved by the lease; he further proved that he was heir-at-law of the lessor, and that the lease had expired; it also appeared that the defendant and some others were in possession for several years, and had not paid any rent to the lessor; but that in the August preceding the trial, being about 4 years after the death of the last surviving *cestui que vie* in the lease, a distress was made on the part of the lessor, but subsequently abandoned without any thing being

levied under it; *Held*, that under such circumstances a notice to quit possession was not necessary before bringing the ejectment.

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years after the expiration of the lease, and then made a distress for rent, was evidence of a subsisting tenancy at that time which had not been shewn to be subsequently determined, either by a notice to quit or demand of possession.

The learned Judge refused to non-suit, and left it to the jury to say whether the distress might not have been made inadvertently or by mistake, and without any intention on the part of the lessor of the plaintiff to treat the defendant as his tenant, and directed them if they so considered it, to find for the plaintiff; but reserved liberty to the defendant to move the Court above to enter a non-suit, if upon the whole of the plaintiff's case they should be of opinion he ought to recover. A conditional order for that purpose having been obtained, on a former day,

Mr. *Hatchell*, Q. C., with whom was Mr. *Brewster*, Q. C., now shewed cause.—

The only ground upon which the defendant can rely as evidence of a tenancy is the distress which was made, but from the circumstances under which that was made, and nothing having been levied under it, it cannot be considered as evidencing any subsisting tenancy which required a notice to quit, or demand of possession.

Mr. *Loneragan*, *contra*, contended, that as it appeared on the plaintiff's own case that he had made a distress upon the lands about two months before the day of the demise in the ejectment, such an act was unequivocal evidence of a tenancy subsisting at that time, and the plaintiff should have gone on to shew such tenancy determined by notice to quit, or at least a demand of possession, and that not having done so, he made out no case to go to a jury; *Lessee Mitchell v. Kelly* (a). The taking of a distress is an act in its nature simple and unequivocal, and one which cannot be qualified by the acting party, or for his benefit;—that it could not be put to the jury to say whether the taking of the distress was an act of trespass or the act of a landlord towards a tenant, and to find their verdict accordingly: it must be one or other of these two things—and no man will be allowed to allege his own wrong to help out his own case; *Zouch d. Ward v. Willingale* (b). Even if the distress were capable of any other explanation than the natural one, namely, the relation of landlord and tenant subsisting at the time, yet the plaintiff offered no such explanation by re-examination or otherwise, though he had the opportunity; and that it could not be put to the jury to surmise an explanation for him different from the natural one, without any thing appearing on the plaintiff's case to ground such surmise: that the subsequent withdrawal of the distress could be *no evidence* for the

(a) 2 Jones, 19.

(b) 1 H. Bl. 311.

plaintiff that defendant was not his tenant at the time of making the distress; and that the withdrawal of the distress for a *specific* reason, and one consistent with a still subsisting tenancy, namely, for an informality in the mode of levying the distress, was more a re-assertion of the plaintiff's right to distrain than any thing else; that there is nothing in the plaintiff's case affording evidence of the minutest kind, and, therefore, none to go to a jury, that the distress was made in mistake or ignorance, or was any thing but the deliberate act of a person asserting a landlord's right. It could not be a question for the jury whether or not the distress was the act of the landlord; for it was made by the authority of Mr. Douglas, the plaintiff's agent for twenty-eight years, and whose authority to receive, and actual receipt of the rent out of the lands in the ejectment, was the only evidence given of the plaintiff's title; that if the distress by Mr. Douglas was not the distress of the plaintiff, neither was the receipt of rent by Mr. Douglas the plaintiff's receipt of rent, and then there was no evidence at all to go to the jury of the plaintiff's title to recover. Independently of the circumstance of the plaintiff's making the distress, the possession of the defendant for a period of nearly four years after the expiration of the lease, with notice to the landlord that it had expired, in itself raised such a presumption of tenancy as justified the defendant in calling for a non-suit, as the plaintiff did not shew any notice to quit or demand of possession to determine such tenancy; *Doe d. Cates v. Somerville* (a); *Doe d. Hollingsworth v. Stennett* (b); *Winterscale v. Newcomen* (c); *Adams on Ejectment* 123. At all events the demand of rent at the end of that period, in the unequivocal form of a distress, put a construction upon the previous possession of the defendant, and estopped the plaintiff from saying such possession was not a lawful one; *Doe d. Whitaker v. Hales* (d); *Lessee Daniel v. Tierney* (e).

Mr. Brewster, Q. C. replied.

THE Court considered that the case was properly left to the jury, and that the verdict should stand.

Rule discharged.

(a) 6 B & C. 126.

(c) 4 Law Rec., N. S. 100.

(e) 1 Jones, 258.

(b) 1 Esp. 217.

(d) 7 Bing. 326.

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Saturday, April 25th.

PRACTICE—SPECIAL JURY—NEW TRIAL OF EJECTMENT—TENANCY FROM YEAR TO YEAR.

BELL, on the demise of SMYTH and others, v. NANGLE.

Where a cause had been tried by a special jury, and upon a bill of exceptions having been taken a *venire de novo* was awarded, and the defendant brought down the cause by proviso; it appeared that the *distringas* was in the common form, except that the words "by proviso" were written under the officer's name; and it was objected at the trial, first, that the *distringas* was informal and irregular; and, secondly, that the special jury which had been struck previous to the former trial was the proper jury to try the case; the Court overruled the objections.

Where in 1768 a tenant for life demised for three lives, in

pursuance of a supposed covenant for perpetual renewal at £28, and his son, also tenant for life under a subsequent settlement in 1806, and again in 1820, at each time on the fall of a life in the lease of 1768, demised by way of renewal, in pursuance of said supposed covenant for renewal, and died in 1830, when the remainderman, the lessor of the plaintiff, entered and continued to receive the rents until 1836, when on the death of the last c. g. v. in the original lease, he brought his ejectment after demand, but before notice to quit: it appeared that the value of the premises was about £400 a-year. *Held*, that the question of a tenancy from year to year was properly left to the jury, and they having found in the affirmative, that the verdict ought to stand.

THIS was an action of ejectment on the title, brought to recover the townland of Mayne, in the county of Westmeath. It was heard before Baron FOSTER and a special jury, struck on the plaintiff's rule, at the Mullingar Summer Assizes, 1837, when there was a verdict for the defendant; but a bill of exceptions having been taken to the direction of the learned Judge, the Court of Queen's Bench, Trinity Term 1838, allowed the exceptions, and awarded a *venire de novo*.* The plaintiff not having gone to trial on the new *venire*, the defendant obtained, in Chamber, after Trinity Term 1839, a rule to try by proviso; served notice of trial, brought down the record, and delivered a common *distringas* to the sheriff.

At the second trial, Mullingar Summer Assizes, 1839, the plaintiff appeared, and his counsel objected, when the cause was called on, that there was no sufficient *distringas*, and contended that the *distringas* being by proviso, should contain after the words "many default," this clause, "Provided always, that if two writs shall come to you there—upon, then you execute and return one of them only, and have there," &c. The *distringas* contained no such clause, but was in every respect in the common form, as if issued by a plaintiff, except that at the foot of it was written the words "By proviso." R. MOORE, Esq., Q. C., the presiding Judge said, that the point was one which, if available at all, could only be taken advantage of above, and declared that he would proceed with the trial, taking a note of the plaintiffs' objection. The plaintiffs' counsel then objected that it should be a special jury which should try the cause, contending that when a rule is made, that the issue be had by a special jury, the rule is not spent by one trial, but that until the rule be discharged it remains of force; and besides that

* See 1 Jebb. & S. 199; S. C. 6 Law Rec., N. S. 325.

the 3 & 4 W. 4, c. 91 (jury act), directs that the jury so struck shall be the jury to try the issue. Therefore, they argued it should either be the same special jury (*i. e.* the same 24), who were struck for the former trial, or at least a *special* jury, not a *common* one. Mr. MOORE took also a note of that objection.

The case being gone into, it appeared in evidence that Thomas Smyth (called the third), being tenant for life, under a settlement of 1766, of those lands, with a limited leasing power, prohibiting taking fines, demised them to Christopher Nangle for three lives, by lease of the 25th of December 1768, taking a fine, and reserved £28. 10s. 3⁴d. per annum, rent, in pursuance of a supposed covenant for perpetual renewal in an old lease; that upon the death of Thomas Smyth, the third, in 1784, his son, the remainderman, under the settlement Thomas Hutchinson Smyth, received the rent reserved under the lease of 1768, and in 1786 levied fines and suffered recoveries, whereby he became tenant in fee, subject to the lease; that this T. H. Smyth on his marriage in 1796 conveyed the lands in strict settlement to the use of himself for life, with limited leasing power, to lease at full yearly value without fine; that so being tenant for life in 1806, 16th January, on the death of one of the *cestui que vies* in the lease of 1768, he executed a lease to the said Christopher Nangle, in pursuance of the same supposed covenant for perpetual renewal, taking a fine, at the same rent; and again, in 1820, 12th August, did the same under the same circumstances. This Thomas H. Smyth died in 1830, when his son, the lessor of the plaintiff, the Rev. Thomas Smyth, the remainderman, received the rent reserved by the several leases of 1768, 1806, and 1820, until 1836, when the last *cestui que vie* died; when upon demand of possession, but without notice to quit, he brought his ejectment, the old covenant turning out in fact not to be one for perpetual renewal. The value of the premises was proved to be about £400 per annum.

The defendant's counsel upon that state of facts contended, that the receipt of rent by the lessor of the plaintiff after 1830, created a tenancy from year to year.

The plaintiffs' counsel on the other hand contended, that the rent received being so much below the real value of the land, and being the exact rent reserved under the leases, it must be considered to have been paid under the leases, or some or one of them, and not under a tenancy from year to year; and that the last surviving *cestui que vie* in the lease of 1768 not having died until 1836, that lease in fact subsisted up to that time, and the payment of rent was to be referred to it.

Mr. R. MOORE, Q. C., left it to the jury to say whether the parties by the payment and receipt of rent intended to create a tenancy from year to

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year,—without any direction, but with a strong intimation of his opinion that they ought to find in the affirmative, which they did.*

A conditional order for a new trial was had upon several grounds; but on the motion shewing cause, the foregoing only were argued, viz., as to the form of the *distringas*, as to the jury, and as to the notice to quit.

Serjeant *Greene*.—The conditional rule has been obtained on three grounds; first, upon the insufficiency of the clause in the *distringas*; secondly, upon the ground that this case ought to have been tried by the special jury, which was struck previous to the former trial; and, thirdly, upon the ground of misdirection in the learned Judge as to the notice to quit. As to the first objection, the *distringas* is, I believe, in the usual form, in cases of trials by proviso; and there is no authority in which a verdict has been set aside upon such a ground as this; for, if it be an irregularity, it is cured by appearance. It is relied on, that where there has been once an order for a special jury to try a case, that that case cannot be tried by a common jury, but must be tried by the special jury alone: but in this case the trial by the special jury virtually took place; there was a verdict for the defendant subject to exceptions, and a *venire de novo* awarded, which is altogether different from a case in which there is no *venire de novo*. The first *venire* and the order for the special jury were each *functus officii*, and if the case was to have been tried by a special jury, a new order must have been obtained. The 13th section of the 3 & 4 W. 4, c. 91, gives the defendant a right to sue out a *venire facias* in case the plaintiff do not proceed according to the course of the Court; the 23d section gives the Court the power to order special juries to be struck, and enacts that “the jury so struck shall be the jury returned for the trial of such issue;” but if the jury once try the issue the words of the act are complied with. The case of *Rex v. Derbyshire*(a) is expressly in point, or rather it is an *a fortiori* case, for in that case the special jury who were struck never tried the cause, the record having been withdrawn. The meaning of the rule of Court is, that *pro hac vice* the special jury shall try this case. In *Rex v. Perry*(b), which will be relied on, the case went off *pro defectu juratorum*, and and that case does not, therefore, apply.

[When Serjeant *Greene* concluded his argument upon this part of the case the Court called upon the counsel for the plaintiff to proceed.]

Messrs. *Smith*, Q. C., and *Batty*, with whom was Mr. *Hamilton Smythe*.

This question turns upon the construction of the last jury act. That act contains enactments relating to common and special juries; every section previous to the 23d relates to common juries, and we rely, upon

(a) 1 Moo. & R. 307.

(b) 22 Lt. Ti. 966; S. C. 5 T. R. 453.

* Sec 1 Cr. & Dix, C. C. 231.

the true construction of that section, that where an order has been once made to have a case tried by a special jury, that case can never be tried by any other jury until that order is discharged. Serjeant *Greene* has relied upon the 13th section; but to come to the true construction of that section, we must recollect the state of the law before the passing of this act. By the 13 *Ed.* 1, c. 30, which was in operation in this country by *Poyning's Act*, the same jury was summoned again and again to try the same case. This was remedied, so far as relates to common juries, by the 7 & 8 *W.* 3, c. 32, *Eng.*, and by a corresponding Irish act, 29 *G.* 2, c. 6, ss. 10, 11; but the act as to special juries remained as it was before. A question like the present arose in *Rex v. Perry* (a). In that case a special jury was struck, and the trial went off *pro defectu juratorum*. It was contended that the rule was thus spent, and a new rule had been obtained for a special jury; but the Court discharged that rule, and decided that the cause should be tried by the jury first struck. The effect of this decision amounts to this, that the old law with respect to the same jury trying the same case remained unaltered, as far as related to special juries, until the passing of the 23d section of this act; all the previous sections refer to common juries.—[*CRAMP- TON, J.* Unless the 13th section applies to special juries, how has the defendant a right to bring the case to trial?—He might discharge the rule for the special jury. At the 23d section, the code relating to special juries commences; and keeping in recollection that at the time of *Rex v. Perry* the enactments relating to common and special juries were not incorporated, the defendant can derive no benefit from the 13th section. It has been said, that this being a case where a *venire de novo* has been awarded makes a distinction; but in *Wright v. Pynder* (b), where a *venire de novo* was also awarded, the Court held that the same jury ought to come again. It is also contended that the order is spent when a trial takes place; but the words of the 23d section are conclusive upon that point; the words "such issue" have reference to the words "issue joined," and the meaning is, that they are the jury to try the case until the termination of the "issue joined." If authority were wanting to shew that this order was not spent by the trial which had previously taken place, *Langley v. Earl of Oxford* (c) is conclusive. If the trial went off for default of jurors, there would be no question upon *Rex v. Perry*, that the case should be tried by a special jury; and in the present case, where the verdict was set aside, it shews that there was not a trial in effect, and the same rule ought to prevail. In the *Mayor of Doncaster v. Coe* (d), the proper course was taken, and that

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(a) 22 St. Tr. 966; S. C. 5 T. R. 453

(b) *Styles*, 34.

(c) 1 T. & Grang. 808; S. C. 1 M. & W. 508.

(d) 3 Taun. 404.

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was an application to discharge the rule for the special jury; and in *Drumgould v. Home* (a) the Court acted upon an objection equally technical. The case of *Rex v. Derbyshire* is not an authority, because in that case there was an order to try it by a common jury. In *Holt v. Meadowcroft* (b), Lord Ellenborough said he doubted whether witnesses would be indictable for perjury upon a trial by a common jury, in a case where a special jury had been struck. The cases of *Rex v. Franklin* (c), *Rex v. Barrett* (d), and *Wilson v. Butler* (e), 2 *Rolls Ab.* 721, sec. 10, are all in support of the same principle: and that the *distringas* in this case was informal appears from 2 *Archb. Pr.* 1100; *Tidd's Forms*, 308; 2 *Saun.* 336, note 5.

Mr. *Berwick*, Q. C.—Upon principle and upon authority this case must be decided with the defendant. The principle upon which the Courts have acted in not having the same jury is shewn in *Loreday's Case* (f), where it is said, "When a jury returned by force of any *venire facias* to try an issue, has given a verdict which is accepted and recorded by the Court, be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue; but if the verdict be so imperfect that judgment cannot be given upon it, then the Court shall award a *venire facias de novo*, to try the same issue by others." In *Cooke v. Landeday* (g), the Court held, "that the jury having once given their verdict, although it be imperfect, shall never be sworn again." In *Gilbert's Common Pleas*, 92, it is laid down, "That if the Judge receives an imperfect verdict, there can be no further process against the same jury, because they are discharged by the acceptance of their verdict;" and in the other Books of Practice, it is laid down, that in such cases a "fresh" jury ought to be summoned.—[CRAMPTON, J. That seems to imply that there should be a new special jury struck.]

Mr. *Tomb*, *amicus curiæ*, stated that the course in the Exchequer was to discharge the former, and get a new rule.

Mr. *Berwick*. The rule is discharged of itself, and *Rex v. Derbyshire* proves that position. Every case cited upon the other side have been cases upon which there were mistrials and not irregularities; and if this case was not to be tried by the same special jury, but by a new special jury, what has taken place amounts to a mere irregularity. This was the

(a) 1 *Hud. & B.* 412.

(c) 5 *T. R.* 455.

(e) 2 *Moo. & R.* 78.

(b) 4 *M. & Sel.* 469.

(.) *Cooke & A.* 112.

(f) 8 *Rep.* 65.

(g) *Cro. Jac.* 210.

case in *Holt v. Meadowcroft*. The case of the *Mayor of Doncaster v. Coe* does not affect the present case, because in that case the special jury was struck, but had never tried the case; but even there the Court went so far as to discharge the special jury, because they had tried a similar cause. The case of *Wright v. Pynder* does not touch this question, because in that case the jury gave no verdict, there being a demurrer to evidence.—[CRAMPTON, J. Suppose you shewed that there was no mistrial, but a mere irregularity, and after the Judge overrules, but takes a note of the objection, would the plaintiff waive his right of insisting upon the validity of this objection afterwards? *—PERRIN, J. A party, by obtaining an order for a special jury, does not prevent the other party from trying it with a common jury.]—That is decided in *Archer v. Bamford (a)*.

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This case is put upon the ground that there was a mistrial; that a special jury having been once struck to try this case upon the former occasion, that that same jury, and not the common jury by which it had been tried, ought to have tried this case. I was very sorry to have been one of those who thought it was a mistrial, but that impression has been removed by the argument of Mr. *Berwick*. No case can be clearer than that it was not the jury that had been struck for the former trial that should have tried this case; and that is a rule advantageous to the jurors themselves and to the parties in the cause; for having once tried the case, they ought not to try it again, and the law pronounces the jurors to be forever discharged. Another objection was made to the form of the *distringas*, it being alleged that it does not contain the usual words, shewing that it was by *proviso*. I am not prepared to say that this was not an irregularity; it occurred, however, through the fault of the Officer, and the opposite party could not be led into any surprise, because it sufficiently appeared from the *distringas* that the record was brought down by *proviso*. As to the party not striking a special jury who brought the record down, I do not think this was a case in which the defendant was bound to strike a special jury; the plaintiff might have had one if he

(a) 1 C. & P. 64.

* In *Holt v. Meadowcroft*, 4 M. & Sel. 469, Lord Ellenborough says, "What might have been the effect of the defendant's appearing at the trial, and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we

"find he did protest, and did all in his power to resist the proceeding. "I cannot agree that it amounts to a consent on the part of the defendant, because being as it were tied to the stake, and dragged on to trial, he endeavours to make the best of it."

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pleased. It is not ordered for the purposes of the Court, but for either party that chooses to have it. The defendant had the power of judging for himself, and was not bound to have a special jury whether he wanted it or not.

PERRIN, J., concurred in the judgment of his Brother BURTON. It was contended that this was to be governed by *Rex v. Perry*. We do not find any fault with or impugn the authority of that case. Where a special jury is struck, that jury is to try the case; but that is subject to the laws of the land. The present case is clearly within the authority of *Loreday's Case*, and must be governed by it.

On a subsequent day the other branch of the case was argued. The cases chiefly relied on by the plaintiff's counsel were, *Denn d. Brune v. Rawlins* (a); *Sykes d. Murgatroyd v. —*, cited in *Right v. Darby* (b); *Doe d. Brune v. Prideaux* (c); *Right d. Dean of Wells v. Bowden* (d); Those relied on by the defendant's counsel were, *Doe d. Martin v. Watts* (e). *Doe d. Tucker v. Morse* (f); and the Court decided that the direction given by Mr. MOORE, Q. C., who tried the case, was correct, and that the verdict should stand.

(a) 10 East, 261.

(b) 1 T. R. 161.

(c) 10 East, 158.

(d) 3 East, 260.

(e) 7 T. R. 83.

(f) 1 B. & Ad. 365.

—
 Saturday, November 15th.

STATUTE OF LIMITATIONS—MASTER'S REPORT— ACKNOWLEDGMENT IN WRITING—PRINCIPAL AND AGENT.

HILL, Assignee of D'COURCY, v. STAWELL.

Where certain suits were pending in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others he reported B. a creditor by a judgment affecting them for a certain sum; *Held*, that this is not such an acknowledgment in writing by the agent of A. to B., or his agent, as will take the case out of the statute of limitations.

SCIRE FACIAS at the suit of James Hill, the assignee of the Rev. Michael D'Courcey, who was the administrator of the Honorable Michael D'Courcey, to revive a judgment of Easter Term, 32 G. 3, for £1000, against the cosusor, Eustace Stawell. To this *scire facias* the defendant pleaded,—first, payment; the second plea stated that after the recovery

report the incumbrances affecting the freehold lands of A., and amongst others he reported B. a creditor by a judgment affecting them for a certain sum; *Held*, that this is not such an acknowledgment in writing by the agent of A. to B., or his agent, as will take the case out of the statute of limitations.

of the judgment, and in the lifetime of the Honorable M. D'Courcy, and before the issuing of the *scire facias*, to wit, on the 1st of July 1792, a present right to receive the debt, &c., accrued to the Honorable M. D'Courcy, then and there being a person capable of giving a discharge for and a release of the same; and that the said *scire facias* was not issued within twenty years after such present right had accrued, and that in the meantime no part of said principal money, nor interest thereon, was paid; nor any acknowledgment of the right thereto given in writing signed by the said defendant or his agent, to the said Honorable M. D'Courcy or to the said Rev. M. D'Courcy or the said James Hill, the plaintiff, or to any of them, or the agent of any of them; the third plea stated, that no part of the principal money, nor interest thereon, was paid; nor any written acknowledgment of the right, &c., given within twenty years before the issuing of said writ.

The plaintiff joined issue upon the first plea; to the second plea he replied, that after the rendition of the judgment, and within twenty years before and next preceding the issuing of the *scire facias*, to wit, on the 2d of January 1838, certain suits were pending in Chancery, to wit, a suit in which William Lane was plaintiff, and the complainant, and said Eustace Stawell and several others were defendants; and a certain other suit, wherein J. R. Barry and others were plaintiffs, and the complainant and the said Eustace Stawell and several others were defendants; and such proceedings were had thereon, that during the pendency of the same, to wit, on the 2d of June 1836, it was ordered and decreed by and with the assent of the defendant, that it be referred to the Master to take an account of incumbrances affecting a freehold property of the defendant; and that the Master afterwards, and after the death of the said Honorable M. D'Courcy, and before the assignment to this plaintiff, and within twenty years before and next preceding the issuing of this writ, to wit, on the 2d of January 1838, with the privity and assent of the said Eustace Stawell, found and reported that there was then due to the said Rev. M. D'Courcy £937. 14s. 5d., and was a charge upon said lands; and that afterwards, to wit, on 12th January 1838, said report was confirmed, by and with the assent of the defendant, and that at the time of the making, &c., of this report, the said Rev. M. D'Courcy was a person entitled to receive the sum secured by said judgment, and capable of giving a release for, and discharge of the same.

To the third plea the plaintiff demurred, and assigned as causes, that it was argumentative and uncertain, and not averred therein save by inference and argument, that a present right to receive the sum secured by the judgment accrued to any person capable of giving a release, &c. more than twenty years before the issuing of the *sci. fa.* or at any time whatsoever; that the averments were irrelevant and immaterial, and no certain issue

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could be taken thereon, and that same consists of negative averments, and concludes with a verification and not with a traverse, and that part of the same is superfluous. The defendant joined in demurrer and joined issue upon the replication to the first plea; and to the replication to the second plea rejoined, that after the decease of the Hon. M. D'Courcy, and before the making, &c. of the said report, to wit, on the 18th of April 1834, the Rev. M. D'Courcy by an indenture of assignment bearing date the said last mentioned day, and duly executed by the said M. D'Courcy, according to the form of the statute in such case, &c. assigned the judgment to the plaintiff and all money due thereon, &c. *absque hoc*, that the said Master as in said replication alleged, before the said assignment to the plaintiff made and signed his report as in said replication alleged, and concluded with a verification. To this rejoinder the plaintiff demurred, and assigned as causes of demurrer that it was not positively averred that the assignment was made by any deed duly enrolled, or that the said deed was enrolled or recorded, or that any assignment was recorded and made in pursuance of the enactments of the statute before the making and signing of said report; and that it did not appear, save by inference and argument, that the several preliminaries required by the statute were perfected, &c.; and that it was argumentative and uncertain, and that it tendered an immaterial issue; and that there was no direct traverse of the averment that the Rev. M. D'Courcy, at the time of the making and signing of said report, was entitled to receive the said sum, and give a discharge for same, and it is argumentative in relation to said last mentioned averment; and that the matter therein set forth is a departure from the defence set forth in the said second plea; and that it concluded with a verification, and not to the country. The defendant joined in demurrer.

Mr. *Napier* having cited *Fortescue v. M'Kone* (a); in support of the demurrer to the third plea, counsel for the defendant did not argue in support of it.

Messrs. *Collins*, Q. C., and *Napier* for the plaintiff, in support of the demurrer to the rejoinder cited the following cases, as to the Rev. Michael D'Courcy being a party entitled to receive payment and give a discharge or release; *Meggison v. Harper* (b); *Ferrall v. Boyle* (c); *Matthews v. Wallwyn* (d); *Williams v. Sorrell* (e); *Deane v. James* (f); *Purdon v. Purdon* (g); and therefore whether the assignment was prior

(a) 1 Jebb & S.

(b) 2 Cr. & M. 322.

(c) 1 Ir. E. R. 391.

(d) 4 Ves. 113.

(e) 4 Ves. 389.

(f) 3 Nev. & M. 392.

(g) 1 Hud. & B. 229.

or subsequent to the Master's report was an immaterial issue; and although alleged by their adversary, being immaterial, they could not traverse it. *Bridgewater v. Bytevens* (a), *Sergeant v. Fairfax* (b). The statute of limitations will be construed in the same way in a Court of law as in equity, *Smith v. Creagh* (c). As to the acknowledgment by the Master being a sufficient bar to the statute, *Jones v. Brown* (d); *Williams v. Innes* (e); *Sibroy v. White* (f); *Daniel v. Pitt* (g); *Rust v. Palmer* (h); *Eady v. Noke* (i); *Wentworth v. Bullen* (k); *M. Stephen v. Brooke* (l).

Messrs. *Smyth*, Q. C., and *Jeremiah J. Murphy* for the defendant, relied upon *Maddock v. Bond* (m); *Graham v. Musson* (n); *Madge v. Reilly* (o).

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BUSHE, C. J., delivered the judgment of the Court. The replication in this case is bad—It was intended to be, that an acknowledgment in writing was given within twenty years. But in order to be so it must be shewn that the Master's report is not only an acknowledgment in writing, but that the Master is an agent for both parties. It does not appear on the face of the replication that they were even parties to the report. The Master's report is not an acknowledgment in writing within the meaning of the act, nor can the Master be deemed an agent. The act contemplates such writing as may be evidence of a right, and the agent such a one as is acting directly under authority. The Master's report is a public document, and not the property of either party; he acts judicially, and the report is his act, and not the act of the suitor; he is appointed by the Lord Chancellor's authority, and his acts are binding, whether he is recognised as the agent or not. There was an attempted analogy of the case of an arbitrator or auctioneer, but the analogy fails, as the authority in such cases proceeds directly from the parties; therefore, the demurrer must be overruled.

**Demurrer overruled.**

- (a) 3 Lev. 113.
- (c) Batty, 386.
- (e) 1 Camp. 364.
- (g) 1 Camp. 365, note.
- (i) 1 Moo. & R. 361.
- (l) 3 B. & Al. 141.
- (n) 5 Bing. N. C. 603.

- (b) 1 Lev. 32.
- (d) 1 Scott, 453.
- (f) 1 Mee. & W. 435.
- (h) 5 Esp. 145.
- (k) 9 B. & C. 850.
- (m) Ir. T. R. 322.
- (o) 3 Y. & C. 425.

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Thursday, May 7th.

MALICIOUS INJURIES—COMPENSATION—CITY OF DUBLIN—CONSTRUCTION OF STATUTES.

In re MILLER and DOWELL.

In re MEADE.

The statutes awarding compensation to the owners for malicious injuries to property do not extend to the county of the city of Dublin. *Semble*, that these acts do not extend to any cities or towns which are counties of themselves.

In these cases two applications were made for compensation for malicious injuries, committed upon property within the county of the city of Dublin. In the first case it appeared that a saw-mill had been maliciously set on fire and was destroyed; and in the second, three horses had been maliciously poisoned. The question raised in the argument was, whether the statutes\* awarding compensation for malicious injuries to property, extended to the county of the city of Dublin.

Mr. *Fitzgibbon*, on the part of one of the applicants, contended that if the case came within the mischief against which the act was directed, the Court would strain the words to bring it within the operation of the act. Although there is no "barony" within the county of the city of Dublin, the Court will, for the purposes of justice, and of giving full

\* The 7 W. 3, c. 21, s. 1, awarded compensation for "robberies, burglaries, burning of houses or haggards of corn, killing or maiming of cattle;" by the 2d section, where damages did not exceed £10, to be levied off the *barony*; and by the 3d section, the damages are to be levied in the manner prescribed in 10 & 11 Car. 1, c. 13, s. 3, namely, by two Justices assessing all the towns, &c. of the *hundred or barony* where such robbery, &c. shall be committed; by the 5th section, notice of the fact was to be given at the *next Assizes or Quarter Sessions*.

The 9 W. 3, c. 34, allows presentments in all the above cases to be made to the Grand Juries at the *Assizes*, for compensation.

The 29 G. 2, c. 14, enabled the Grand Juries of the county of the city of Dublin, and the county of Dublin, to make presentments for all purposes for which the Grand Juries at the *Assizes* in the several counties were authorised to make presentments of money; but the 5th section provided that nothing therein should extend to authorise presentments on robbery petitions.

The 15 & 16 G. 3, c. 21, s. 1 (the Whiteboy Act), awarded compensation for all injury and damage to person and property, by petition to the Judge at the *next Assizes*, to be examined into in the presence of the Grand Jury; and if Judge of opinion that party was entitled to amends, Grand Jury to present the same.

The 19 & 20 G. 3, c. 37, s. 1, recites, that doubts were entertained with respect to the construction of the 7 W. 3 and 9 W. 3, and enacts, that the inhabitants of every *barony* and county, or if the place uncertain of both contiguous, shall fully satisfy for malicious burning of houses, barns, &c., by day, on the terms in said acts; and by section 2, where damages exceed not £100, satisfaction by the *barony*; where above £100, by the county.

The 36 G. 3, c. 32, recites the 15 & 16 G. 3, and that as *Assizes* are never held in Dublin, persons residing therein were without remedy, and then extends the provisions of the 15 & 16 G. 3, to persons residing within the county and the county of the city of Dublin.

operation to the intention of the framers of this statute, consider the county of the city of Dublin as if it were a barony in itself.—[BURTON, J. There are other acts which have been held not to extend to the county of the city of Dublin on account of this word “barony” occurring in them; and as to the way in which the Court ought to construe this statute, where a duty or charge is imposed the statute is considered penal, and not remedial, and ought, upon that account, to be construed strictly.]—That would be so if this were a tax in the strict sense of the word; but this is a payment made for the benefit and protection of the public. There is no better guide for the construction of an act of parliament than the intention of the legislature in framing the statute, and what reason can there be assigned for awarding compensation, in cases like the present, in every place except localities in which baronies do not exist?

Messrs. *Henry Martley*, and *H. G. Curran*, *contra*.—The old acts are out of the case; as substantial enactments they have long since expired, and the only act within which the applicants can possibly bring their case is the 19 & 20 G. 3; the 2d section of that act enacts, that in case the damages do not exceed £100 they are to be levied off the barony; but if they exceed £100, then they are to be levied off the entire county. The 15 & 16 G. 3, was as general as possible, with the exception that it had the word “assizes;” and it was held that that was sufficient to prevent its operation in the county of the city of Dublin. The enactments as to the rating in the 19 & 20 G. 3, could not possibly be complied with in the county of the city of Dublin, there being no baronies therein, and for that reason the act cannot be construed to extend to it.

Mr. *Macdonagh* replied, and contended that the Court would not put a construction upon these acts which would exclude all the cities and towns in Ireland, being counties in themselves, from their operation, because the word “barony” occurs in them. *In re Chamley (a)*, the Court decided that the county of Dublin was within the operation of these enactments, and upon this principle, that the 9 W. 3, gave this relief generally; and that there was no intention in framing these enactments to alter the former statutes, save only so far as respected the machinery by which the relief given by them was to be obtained. The city of Dublin and its franchise is itself a barony, and the Archbishop sits in the House of Lords by virtue of that barony.

BURTON, J.

It is quite plain that some levies are to be made out of the county, and some out of the barony, and half-barony; and that being so, I do not think it is possible to contend that this act can be construed to extend to localities where there are no baronies.

The other members of the Court concurred, and

The petitions were dismissed.

(a) 1 Jebb & S. 319.

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IN RE  
MILLER.

*COURT OF EXCHEQUER CHAMBER.**Thursday, May 14th.***TOMB v. THE COMMISSIONERS, &c., OF BELFAST, in error.**

THIS was a writ of error brought to reverse the judgment of the Court of Queen's Bench (*a*).

The Court having differed in opinion upon this case (*b*), delivered their judgments *seriatim*, and the members of the Court were thus divided;

BUSHE, C. J., BURTON, J., FOSTER, B., and CRAMPTON, J., were of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

DOHERTY, C. J., JOHNSTON, J., PENNEFATHER, B., PERRIN, J., RICHARDS, B., and BALL, J., were of opinion that the judgment ought to be reversed; PERRIN, J., expressing a strong opinion that a *venire de novo* ought to be awarded, and PENNEFATHER, B., an equally confident opinion that the judgment ought to be reversed, but that no *venire de novo* ought to be awarded.

The COURT ultimately awarded a *venire de novo*.

(*a*) 1 Ir. Law Rep. p. 164.

(*b*) 1 Smythe, 401.

Judges BURTON and PERRIN were presiding at the Special Commission of Tipperary when this case was decided in the Court of Queen's Bench.

CASES IN THE QUEEN'S BENCH,  
TRINITY TERM.

Friday May 29th.

REPLEVIN—TENANTS IN COMMON—DEMURRER—  
DUPLICITY IN PLEADING.

REEVES, in Replevin, v. MORRIS.

THIS was an action of replevin for the taking, and unjust detention of eighty oil paintings, and their frames. To the declaration, which was in the common form, the following pleas were put in :—

First, *actio non* ; “ because he saith, that the said paintings with their frames, in the said declaration mentioned, &c., were the property of the said defendant, and not of the said plaintiff, as by the said declaration is above supposed ; and this he, the said defendant, is ready to verify, &c. ; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, and he also prays “ a return of the said paintings,” &c.

Second, *actio non* ; “ because he saith, that the said paintings with their frames, at the said time, &c., were the joint property of the said plaintiff and defendant, and not the sole property of the said plaintiff, as by the said declaration is above supposed ; and this he is ready to verify ; wherefore he prays judgment, &c. ; and he also prays a return “ of the said paintings,” &c.

Third, *actio non* ; “ because he saith, that as to the taking of the said paintings and their frames, he, the defendant, did not take the said paintings and their frames, or any, or either of them, or any part thereof, in manner and form as he, the said plaintiff, has above complained against him ; and as to the detaining, &c., he saith, that the said paintings and their frames before and at the time, &c., were, and still are, the joint property of the said defendant and the said plaintiff, and not the sole property of the said plaintiff as alleged ; and being the joint property of the said plaintiff and defendant some time before, and at the time, &c., were in the custody and possession of the said defendant, with the permission and assent of the said plaintiff ; wherefore “ he detained the said paintings and their frames, as he lawfully might,

Where to a declaration in replevin, the defendant pleaded that the property in question was the joint property of himself and the plaintiff—*Held*, that this was a good plea ;—and where to the same declaration, several other pleas were pleaded, in all of which the taking was denied, and the detention justified—*Held*, that the said pleas were bad for duplicity.

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"for the cause aforesaid; and this, &c., wherefore he prays judgment, &c., and he also prays a return," &c.

The fourth plea differs from the preceding, in omitting the statements that the paintings, &c., were in the custody and possession of the defendant with the permission and assent of the plaintiff.

Fifth plea, *actio non*; "because he saith, that as to the taking, &c., he did not take, &c.; and as to the detaining, &c., he saith, that it was agreed between the said plaintiff and the said defendant, that he the said plaintiff should deliver the said paintings, &c., to the said defendant, to be restored and cleaned by him, for such reasonable price as he, the said defendant, should reasonably deserve to have for the same; and that the said defendant should restore and clean the same for such reasonable price or sum, and that he, the said defendant, should and might detain the said paintings, &c., until he should be paid by the said plaintiff such reasonable sum or price as he reasonably deserved for restoring and cleaning the said paintings; and that afterwards, &c., in pursuance of said agreement, the plaintiff did deliver the said paintings to the said defendant, to be by him restored and cleaned, and to be by him detained until he should be paid such sum, &c.; and that afterwards, &c., the said defendant did restore and clean the said paintings, and did reasonably deserve to have and receive from the said plaintiff, for so restoring and cleaning the said paintings, a large sum of money, to wit, &c., of all which the plaintiff then and there had notice; yet the said plaintiff did not, and would not pay him such sum, or any sum whatever, &c.; wherefore the said defendant before, &c., did detain the said paintings," &c.

The sixth plea differs from the preceding, in the omission of the statement of a special agreement between the plaintiff and defendant, with regard to the delivery and detention of the pictures.

On the first of these pleas issue was taken, and to all the others the plaintiff demurred, and assigned various causes, which will appear in the arguments of counsel.

Mr. Haig, in support of the demurrer.—The second plea (which was the first demurred to), is founded on the principle, that one tenant in common cannot maintain an action against the other, which principle is laid down in *Litt. s. 323*, and also in *Barnardiston v. Chapman*, cited in the case of *Heathe v. Hubbard* (a), from Lord C. J. King's MSS. This principle was considered and modified in *King v. Coates*, (b), where Baron Pennefather observed, "that it would be a strange anomaly in our law, if a case were to be found of an admitted injury without a legal remedy;" and we have none but replevin, as the defendant has virtually disaffirmed the joint tenancy, and deprived us of our right of rescapion.

(a) 4. E. R. 121.

(b) 1 Ir. Law Rep. 59.

The cases of *Burton v. Williams* (a), and *Jackson v. Anderson* (b), establish the principle that one tenant in common has a right to maintain his action against his co-tenant. *Stancliffe v. Hardwicke* (c), was also a similar case; but as the decision in that case turned on the construction of the New Rules in England, whether a tenancy in common was a defence under the general issue, we do not rely on it. We are not, however, driven to depend upon these cases, inasmuch as there is no averment that the defendant was tenant in common, or joint tenant, or what was the nature of his estate—whether part owner, or owner of a part; the plea is, therefore, bad for uncertainty, it being a general principle in pleading, that a party pleading his own title must do it with particularity; *Rider v. Smith* (d); *Com. Dig. Pleader*, c. 21.—[*Per Curiam*. There is no special demurrer for uncertainty.]—We conceive that the objection can be taken on general demurrer. Moreover, the rule as to setting out title with certainty is peculiarly strict in replevin; *Steph. on Plead.* 221. This plea is also uncertain, for the further reason, that it does not shew what share the defendant claims, though he prays a return. *Com. Dig. Pleader*, c. 21.

As to the third plea, we object to it—First, for uncertainty, and for the same reasons as the former—Second, it is defective as an avowry, in praying a return. On this subject Baron Gilbert lays it down in his *Treatise on Replevin*, p. 133—“In replevin both parties are active, the plaintiff to have damages for the taking and detaining, and the avowant “to have a return of the beasts; the avowry acknowledges the taking, “but avoids the injustice of it, and sets forth a good cause for taking “such distress, in order to have it returned.” Here there is no pretence of a good cause for taking the goods, which shews that the prayer for a return is bad.—Third, this plea is bad for duplicity; it in fact contains three defences, viz., that he did not take—that there was a joint tenancy—and that he detained them by permission of the plaintiff. The rule of pleading is, that you cannot put in one plea two distinct matters, either of which would defeat the action; *Blake v. Grove* (e); *Steph. on Plead.* 251, 255. But this pleading is not only double, but it is also repugnant, in denying the taking, and admitting the detaining, for each detention is a taking; *Walton v. Kersop*. (f). If this mode of pleading is good, it would be a good declaration in replevin to say, that the goods were taken in one place, and detained in another place, and on another day, which would be clearly bad for duplicity—it is as if in trespass *de bonis asportatis*, the defendant pleaded that he did not take the goods, but that he carried them away: and if it be a good mode of pleading

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(a) 5 B. &amp; Al. 405.

(b) 4 Taunt. 24.

(c) 2 Cr. &amp; M. 1.

(d) 3 T. R. 766, 768.

(e) 1 Sid. 175.

(f) 2 Wils. 354.

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an action might be brought for taking in one county and detaining in another; but such would be against express law; *Prior of Lewis v. Botillier* (a). These cases shew that the taking and detaining are a single point. This plea is also bad for another reason, viz., that the justification of the detention is itself double—for it admits the detention charged in the declaration (which means, of course, a detention against the plaintiff's will), and then avers that the detention was by the permission of the plaintiff. Finally we say, that it amounts to the general issue of *non cepit*.

With respect to the fourth plea, our objections to it are—first, for uncertainty; second, for praying a return; third, for duplicity and repugnancy; and, fourth, that it amounts to the general issue: and the reasons are similar to those on which we have founded our objections to the preceding plea.

As to the fifth plea, our objections are—first, that it is double, and repugnant, in denying the taking and admitting the detention, for the reasons before mentioned, and that the proper form of an avowry for a lien is that in *Yorke v. Greenough* (b); second, that it amounts to the general issue; and, third, that no demand of the sum he claims is pleaded.

Our objections to the sixth plea are the same as those to the preceding, and also that the defendant has not averred that he belonged to any trade. The former have been already disposed of, and as to the latter, the common law right of lien extends only to artificers, and is for the benefit of trade; and no case can be shewn where a person, not appearing to be a trader or artisan of any sort, and who may casually have done some repair to a chattel, has been held to have a lien upon it; thus in *Yorke v. Greenough* it was held necessary to shew that the plaintiff was a guest.

Mr. Monahan, Q. C., and Mr. Napier, in support of the pleas.

If there is any novelty in these pleas, it has arisen from the fact of the action of replevin having been applied to a case to which it ought never to have been applied.

With respect to the second plea (which is the first that has been demurred to), we shall consider it as if no other plea had been pleaded, and as if this case had occurred before the statute of double-pleading; and this we may do, as each of the pleas are as unconnected with the others as if they were on separate records; per Buller, J., in *Kirk v. Nowill* (c). The issue raised upon this second plea is, whether the goods were the sole property of the plaintiff; *Hubloun's Case* (d); and, therefore, the affirmance of the issue would be on the plaintiff, to shew

(a) 5 Edw. 2 134; Bro. Ab. Trespass, pl. 171.

(b) 1 Salk. 388, & 2 Ld. Raym. 866.

(c) 1 T. R. 125.

(d) Skin. 65.

that the goods were his property; and this, though the declaration does not state that they were his sole property, for it must be implied, to sustain the action of replevin; *Gilbert v. Parker* (a). As to the objections that have been attempted for uncertainty, none can now be made, either to the inducement or the traverse in that respect, as there is no special demurrer on that ground, *Archb. Pl. & Ev.* 195 (2d ed.); nor even if there were a special demurrer, would that hold; for on issue knit the plaintiff would recover to the extent of his proof; 1 *Saund.* 312, d. (5); and, therefore, in pleas of property the issue is always in this form. The first question upon this plea is, whether replevin is maintainable where there is a joint property between the plaintiff and defendant; and for this purpose it is to be considered how the parties stood when the writ of replevin issued. When there is a joint property the law will not interfere to change the possession—each may take it when he has an opportunity, but he has no remedy by action; *Cubitt v. Porter* (b); *Knight v. Coates* (c). It is clearly settled, that trover will not lie; a *fortiori* replevin will not, because in trover damages are sought, whereas in replevin the property in specie is demanded, and it so laid down in *Hammond's N. P.* 403. The facts, therefore, admitted by this demurrer shew that replevin is not maintainable. Next, as to the prayer for a return—where any plea shews that the plaintiff has not such a property as entitles him to divest the defendant of the possession, the defendant is entitled to a return; *Gilb. Rep.* 210; *Hammond N. P.* 435. This principle is stated in *Salkeld v. Skelton* (d); *Butcher v. Porter* (e); *Parker v. Miller* (f). The point is, to decide upon the facts on the record, who was entitled to the possession when the replevin issued;—and it is clear, that where they are jointly entitled, the actual possession can only be divested by recaption; it is therefore plain, that on this second plea, judgment must be for the defendant, and a return granted.—[PERRIN, J. You have no right to an exclusive possession, and yet you pray it.]—The Court ought to put us in the same position that we were in before the replevin issued.

With respect to the third plea, the discussion will involve objections to all the pleas. It divides the taking and detaining, and the amount of the objection is, that it contains a double answer to the declaration. It denies the taking, and goes on to explain the detention. There are certain exceptions to the rule against duplicity; and it does not apply where the duplicity has been caused by the plaintiff himself; *Hammond N. P.* 416; for instance the common plea of *cepit in alio loco* would, if now argued for the first time, be open to the same objection. But there is no duplicity

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(a) 2 Salk. 629.

(c) 2 Jones &amp; Carey, 27.

(e) Carth. 244.

(b) 8 B. &amp; C. 269.

(d) Cro. Jac. 519.

(f) 1 Ld. Raym. 217.

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in this plea, *Rowles v. Lusty* (a). The anomaly of replevin is, that the parties stand in the double characters of plaintiff and defendant—the plaintiff seeks for damages and the defendant for a return.—[CRAMPTON, J. Would the plaintiff be at liberty to take a double traverse on this plea?]—He would not I consider.—I consider it to be a mere suggestion for a return. The taking alleged is one thing, the detention is another, and the latter implies a taking. *Non cepit* is used where there has been either a taking or detention; *Mayn. Rep.* 155, *Hil.* 5, *Ed.* '2. Replevin in the *detinet* only is maintainable, as appears from *Dallison*, 84, *pl.* 36. *F. N. B.* 69. *Fitz. Ab. Replevin*, *pl.* 27. In a trespass for assault, battery, and wounding, the defendant may plead *not guilty*, as to the wounding, and a justification as to the assault and battery, *Marsh* 68. *pl.* 106; so here the defendant might have been guilty of the taking implied in the *detention*, and not of the express taking alleged, and specifically traversed; and if the defendant cannot plead thus, any bailment might be defeated by replevin, for either there will be no return prayed, or it will only be prayed on a demurrable plea.

The only other pleas that it is necessary to notice, are the fifth and sixth pleas. With regard to the fifth, it has been objected, that no demand of the sum claimed has been averred; but the law is, that the plaintiff should have tendered the sum due, to have restored his right of possession; *Dunratty v. Crowther* (b); *Wallace v. Woodgate* (c). The only other objection that has not been answered is that to the sixth plea, viz., that the defendant should in stating a lien have averred that he belonged to a trade; but a mere bailment for the purpose of exercising his labor and skill, is sufficient to give him a lien on the property bailed; *Scarfe v. Morgan* (d): and if replevin be brought in such a case, how is the defendant to protect himself and get a return, if this objection should be held valid?

Sergeant *Greene*, in reply.—Considering the latter pleas first.—Our objection has not been accurately stated by Mr. *Napier*; for we not only object to those pleas for duplicity, but also for inconsistency and repugnancy. The passage that has been quoted from *Hammond's N. P.* 416, is erroneous, and no authority for the position is quoted by him. The question is, whether distinct answers are required to the different parts of the plea; *Co Litt.* 304, a; and to the usual plea of *cepit in alio loco*, there cannot be distinct answers; therefore there is no analogy between that plea and those we are considering; 1 *Sand.* 347. The denial of the taking amounts to a denial that he ever had the property at all, which would be a full answer to the declaration; but it

(a) 1 M. &amp; P. 123.

(b) 11 B. Moore, 479.

(c) 1 Car. &amp; Pay. 575.

(d) 4 M. &amp; W. 283.

would not have entitled him to have a return ; and if the justification of the detention were a mere suggestion for that purpose (as it has been alleged), not being traversable, it would have been good pleading. For instance the plea of *non cepit*, and a suggestion, would have entitled him to a return. But this is not a mere suggestion for a return—it is a second answer to the declaration, and would require two replications. It is also repugnant, as it is impossible to admit the detention of what you never had in the place alleged ; *Walton v. Kersop* (a) ; *Evans v. Elliott* (b). Our objection, therefore, is that the pleader divides the wrong into two parts and concludes to the country, which precludes the latter part from being taken as a suggestion. When the plea of *cepit in alio loco* is pleaded with a *per se* defence, it will be held bad for duplicity ; *Vin Ab. Double plea*, 192, pl. 84 ; and the proper mode of pleading would have been, to have admitted both the taking and detaining, and to have justified the detaining, as in *York v. Greenough*. A plea ought to be a complete denial or a complete justification.

The second plea raises a different question. It is also a bad plea, though it is not open to the objection of duplicity—it confesses the taking, and amounts to a justification of it entitling him to a return ; but still it cannot be sustained, as it admits only a qualified property in the plaintiff. It is not the case of a single chattel which is indivisible, but of several distinct chattels, for the whole of which replevin has been brought, and the particular nature of each part of the property has not been set out : it does not state that each and every chattel was the property of the plaintiff and defendant, and if it had been so pleaded, it might have been analagous to the case of a single chattel ; therefore, the defendant has no right to the benefit of being in the position of a right without a remedy. Consistently with this pleading the parties might have been tenants in common of undivided moieties, and if issue had been taken on it, it would not be necessary to prove an undivided moiety in each, but the issue would be maintained if any one picture turned out to be joint property.—[BURTON J. Is that assigned as a cause of special demurrer ?]—No ; but it is matter of substance, and can be taken advantage of in general demurrer, on the ground that the whole declaration should be answered. The defendant must shew a better title as between him and the plaintiff ; and Mr. Napier mistook, when he stated that the action had been brought to decide a right of possession ; a right of property is the question. In the case of a lien, the special property is paramount over the general property, and suspends it ; so that there is no property in the plaintiff at the time—so also in the case of a distress ; and therefore the plaintiff would be a wrong-doer ; but he has shewn here a lawful property, that the other party has no right to divest. As to the danger of counter-replevins, the same may be

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(a) 2 Wils. 354.

(b) 5 Ad. &amp; El. 142.

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said of counter-ejectments, and it is only an inconvenience that results from the law itself which gives the right of recaption; and if the writ of replevin should be so abused, the Court of Chancery has it in its power to quash it, and no injustice will be done to any person.

BUSHE, C. J.—On the demurrer to the second plea two questions arose.—First, whether one joint tenant, or tenant in common, can bring an action against his co-tenant, to recover the chattel in which they have a joint property; and secondly, whether the plea is bad in having prayed a return. As to the first of these questions, it is settled law as laid down by *Littleton* in his 323d sect., “That if two be possessed of chattels personal in common by divers titles, if the one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him, who hath done to him the wrong, to occupy in common, when he can see his time;” and it has been held that neither trover nor trespass (and I cannot see any distinction in principle between these actions and replevin), can be brought by one tenant in common for the recovery of their joint property, from the exclusive possession of the other—the law affording no remedy for such a detention, but leaving the party to restore his right to occupy in common by recaption. But when the possibility of recaption has been taken away by the act of one of them, the reason of the foregoing rule ceases; and as the law allows of no wrong without a remedy, the aggrieved party may maintain an action against the other—thus, where one of the parties, either actually or virtually destroys the property in question, it has been held that the other can maintain his action against him for the injury. Within the reason of this exception the plaintiff has endeavoured to bring his case, but ineffectually; and therefore on that point the objections have failed. As to the second question, the prayer for a return might be held to be liable to objection on a special demurrer; but as it is not matter of substance, and as it has not been assigned as a special cause of demurrer, the plaintiff is not entitled to the benefit of it. Therefore the objections to the second plea must be overruled.

With regard to the remaining pleas, the objection that has been made against them for duplicity is good, inasmuch as they all contain two distinct matters of justification, either of which is a sufficient answer to the whole declaration. From this the defendant has endeavoured to escape, by dividing the action into two heads, viz., the taking and the detention, on the ground that there may be a wrongful detention without a wrongful taking, and that there may have been a taking without any continuing detention, so that the plaintiff may complain of either as a distinct injury. But a denial of the taking is an answer to the whole declaration, and the subsequent justification of the detention is a distinct ground of defence, and makes the plea double. We must, therefore, allow the demurrer to the four last pleas.

BURTON, J., and CRAMPTON, J., concurred in the judgment of the Court.

PERRIN, J.

I concur with the judgment of the Court as pronounced by my LORD CHIEF JUSTICE; but with respect to the second plea, I wish to observe, that, in my opinion, the prayer for a return is proper; and I found that opinion on the following statement of the law on this subject, as laid down by Chief Baron Gilbert—"When the defendant, instead of an avowry, pleads to the writ of replevin, in some cases he shall have a return *without any avowry* or conuizance. And in order to settle this, it will be necessary to take up a distinction already observed, between pleas that disaffirm property in the plaintiff, and pleas that admit property in the plaintiff. As if the defendant in the replevin pleads property in the beasts himself, or in a stranger (whether it be pleaded in abatement of the writ, in bar of the action, or in justification), if the defendant prevails in it, he shall have a return without an avowry; because, if these pleas be true, they destroy all right of complaint in the plaintiff for the capture and detention; and if the plaintiff hath no right to the writ of replevin in the present form, nor under any other, he ought to have no benefit for his unjust complaint; and, therefore, the Court must award restitution of the beasts to the defendant, out of whose possession they were taken by the replevin;" *Gilbert on Replevin*, 209. So here, the defendant having pleaded property in himself, and a right of possession at the time of the issuing of the writ of replevin, the Court must award a return, and the prayer to that effect is proper.

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**FELONY—ARREST—FALSE IMPRISONMENT—REASON-  
ABLE GROUNDS OF SUSPICION—BILL OF EXCEPTIONS.**

**ANNETTE v. OSBORNE.**

In this case the question arose on a bill of exceptions taken to the charge of Mr. Justice TORRENS, on the trial of an action of trespass for false imprisonment at the last Spring Assizes for the county Armagh. The material facts of the case, as they were stated in evidence, were

A party was arrested by a magistrate on suspicion of felony, who sent him in the custody of a policeman to

the house of a person, who could not leave his bed, for the purpose of identification, and with the orders that in the event of his being identified he was to be taken from thence to gaol. The prisoner having been identified, was, in accordance with the foregoing orders, committed to gaol, and afterwards acquitted by a jury of the charge. *Held*, that in an action against the magistrate for false imprisonment, the jury were rightly charged,—that the conduct of the magistrate was illegal. *Held*, also, that *lona fides* in the mind of the magistrate was no justification.

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as follows :—A robbery, attended with personal violence, having been committed on the 9th of December 1837, in the house of a woman of the name of Anne Lennon, in the neighbourhood of Portadown, in the county of Armagh, on the 14th day of the same month, the police came to the residence of a person of the name of Robert Neill, and arrested him for the felony. The plaintiff accompanied the said Neill, and at his request, to Portadown, for the purpose of offering himself as bail for him; and they were brought before the defendant, who was the stipendiary magistrate for the district. The defendant on that occasion asked the plaintiff who he was; and on his stating his name and residence he was informed by the defendant, after some private conversation with the police, that he was to consider himself a prisoner also, and that he would send him to gaol, as agreeing with the description that had been given of the man who had wounded Felix Lennon, one of the sons of the said Anne Lennon, at the aforesaid attack and robbery. He was accordingly, shortly afterwards, sent in the custody of a policeman to the house of Felix Lennon (who was confined to his bed by the wounds he had received on the aforesaid occasion), for the purpose of identification by him, and with the order, that in the event of his being identified by him, he should be straightway taken from thence and lodged in the gaol of Armagh. It appeared that the plaintiff was identified by Felix Lennon as the person who had wounded him on the night of the robbery, and accordingly he was handcuffed by the policeman, and conveyed to Armagh (which was at the distance of twelve miles from Portadown), in pursuance of the aforesaid orders of the defendant. On the plaintiff being brought to the gaol, the gaoler refused to receive him, as there was no written warrant for his committal; but in the course of the same evening of the 14th of December, a warrant of committal for further examination having been obtained from Mr. Dobbin, who was one of the resident magistrates for the town of Armagh, he was received into the gaol. On the 16th of December a warrant of committal in the usual form, and signed by the defendant, was sent to and received by the gaoler; and it also appeared, that informations had been sworn on the 15th of December (the day succeeding that of the arrest and imprisonment), against the plaintiff, by one Michael Lennon, who was the brother of Felix Lennon, but not in the presence of the plaintiff. On these informations, and the subsequent informations of Felix Lennon, which were also sworn behind the back of the plaintiff and before the defendant, on the 16th of December, he was detained in custody for three months, when he was brought up for trial at the Spring Assizes of 1838, on three several indictments that were found against him by the grand jury, and having been acquitted on them all, he was discharged from custody; on which he brought his action of trespass for false imprisonment against the defendant, after having given

him, as a magistrate, the proper notice of action, and sued out the writ in due time.

At the trial the learned Judge, in his charge to the jury informed them, "That no legal justification of the arrest and imprisonment of the plaintiff had been made out by the defendant—and it was the duty of the magistrate to have gone to Felix Lennon and to have taken his informations; but that instead of doing so, he gave mere verbal instructions to the constable to proceed with the plaintiff to the house of Lennon; and that the defendant not having taken the preliminary steps of sufficiently ascertaining the identity of the plaintiff, no unsworn informations could justify him in arresting him. It was the duty of the magistrates to bring all persons accused before them for examination, in order to give them an opportunity of stating any circumstances which were in their favor; and that the conduct of the defendant in this case could not be defended as a legal act; and that the jury had then to consider the amount of the damages." To this charge the counsel for the defendant excepted, and prayed the learned Judge to inform the jury, "that if they believed that a *bona fide* suspicion of the plaintiff's guilt rested on the mind of the defendant; then they ought to find for the defendant—and further, that he should tell the jury, that reasonable ground for the defendant to suspect the plaintiff's guilt had been proved in the present case, and that, therefore, the jury should be directed to find a verdict for the defendant." The Judge refused so to direct the jury, and accordingly a bill of exceptions, embodying the foregoing objections, was tendered to, and signed by his Lordship. The jury found for the plaintiff, with £15 damages.

Mr. *Hanna*, in support of the exceptions contended, that the conduct of the defendant, though not formal, yet was not sufficiently informal to render him liable to the action. It was alleged, that the informality was composed of three particulars—first, there was no committal in writing, —second, there were no sworn informations antecedent to the committal, —and, third, the subsequent informations were not taken in the presence of the plaintiff. We shall first consider how the question stood at common law, and then, whether any alteration has been made therein by statute. The earliest authority on the subject is to be found in the *Year Book*, 7 H. 4, 35, pl. 3, where the question of a special justification of an arrest by a peace-officer without a warrant, and where it turned out afterwards that no felony had been committed, arose on demurrer; and in that case the Court seems to have been of opinion, that if the cause of suspicion should appear reasonable, the justification would be good, though no felony had been committed. The same position is laid down as law in *Bro. Ab* 320, and 2d *Inst.* 52; and also in 2 *Rolle. Ab.* 359,

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*Trespass, D.* All these authorities are strongly in favor of our position; inasmuch as in them it has been ruled, that even if it should turn out that no felony had been committed, the Officer would be justified in arresting without a warrant, whereas, in this case, it is conceded that a felony had been committed. As to the question of the warrant of committal not having been in writing, we contend that it may be by *parol*. In 1 *Hal. P. C.* (chap. commencing at p. 175), and in 2 *Roll. Ab.* 558, *Trespass*, it is laid down that a warrant may be *ore tenus*; and in *Rex v. Woolmer (a)*, and *Rex v. Ford (b)*, it was decided, that the killing of an officer is murder, though he has no written warrant for the arrest. In 2 *Hal. P. C.* 85, there is an enumeration of certain officers who are empowered to arrest felons on suspicion, and the first of them is a justice of the peace; moreover there can be no doubt but that whatever a peace-officer is empowered to do, a justice of the peace is justified in doing; and it has been distinctly ruled, that a peace-officer may justify an arrest on *reasonable suspicion* of a felony having been committed; *Samuel v. Payne (c)*; *Beckwith v. Philby (d)*; and *Davis v. Russel (e)*; and therefore a justice of the peace may, on similar grounds of suspicion, arrest an individual, even though it turn out that no felony has been committed. Our case is an *a fortiori* case, as it is admitted that a felony had been committed. Such is the position of the question at common law, and which we contend remains unaltered by statute. If the magistrate's conduct has been illegal, when did the illegality commence? He was perfectly justified in arresting the plaintiff in the first instance, and he was also justified in sending him in custody to have him identified, instead of going with him, having other important duties of his office to attend to; and when the prisoner was identified the constable was justified in detaining him on the charge of felony, and consigning him to the gaol—at all events, when the committal was obtained from Mr. Dobbin—and if he had acted differently he must have violated his duty. But it will be contended by the other side, that the common law on this subject has been altered by the 9 G. 4., c. 54. But such a conclusion is founded on an erroneous view of the object of that statute. For, from the preamble it appears, that it was not passed for the protection of felons, but for the security of the public; and the enactments of the first and second sections, which it will be insisted have not been carried into effect, were passed for that purpose. Thus, it will be argued, that because the defendant did not bring Francis Lennon to identify the prisoner, or take the prisoner to him for the purpose of having him identified in his presence, that his conduct was illegal; but

(a) 1 Moody C. C. 334, 336.

(b) Russ. &amp; Ry. 329.

(c) 1 Doug. 359.

(d) 6 B. &amp; C. 635.

(e) 5 Bing. 354.

the unsoundness of this argument arises from the foregoing mistake as to the objects of the statute. The public have suffered by the omission, not the plaintiff; inasmuch as the informations on which he was committed, not having been taken in his presence, could not have been read against him on his trial for the felony, *Rex v. Dingler* (a). The plaintiff had nothing to complain of; and we therefore contend, that as the statute in question was not passed for his protection, that he cannot derive any benefit from an omission on the part of the defendant to comply with its provisions to the letter.

Mr. Napier, for the plaintiff.—The defendant has violated every principle, both of the common law and statute law, so palpably, that if it were a case that had arisen between two private individuals, it would be scarcely necessary to produce an authority to establish the illegality of his conduct; but this being a case in which the Crown seeks for the opinion of this Court, to direct the magistracy of the kingdom in the discharge of their functions, it is advisable that the law and the authorities that bear on the case should be sifted, and established beyond dispute. It is admitted by us that a felony had been committed, and on the other side it is not denied, but that a trespass against the plaintiff was committed by the direction of the defendant; and the question for the Court to decide is, whether the circumstances of the case afford any justification for it? We do not controvert the authorities which have been cited to shew, that a constable is not only empowered, but bound to arrest on reasonable grounds of suspicion, without sworn informations; but it is for the purpose of taking the person arrested before a magistrate to have informations sworn against him; and even in that case, it is necessary that the person putting the constable in motion should be present; 2 *Hal. P.C.* 91. The power of the constable in such a case is commensurate with his ministerial duty; and he is bound to satisfy himself, by all the means of information within his control, that the charge is *bona fide*, for he is bound to act, and yet cannot hear evidence: the rule, therefore, is founded on necessity, not on authority. It is incumbent on him to bring the party accused before the magistrate, that he may see and hear his accuser, and give any explanation of his conduct, that may operate to discharge him, or at all events to admit him to bail. But in this case, the order of things is inverted—the magistrate delegates his authority to the constable, to take the informations, and commit or discharge the prisoner. If he had ordered the constable to bring him back to him after that he had been identified, there might have been some sense in the course, though the authorities do not go even so far as to justify such a proceeding; and

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(a) 2 Leach, C. C. 562.

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no excuse for the magistrate not accompanying the constable appears on the record. In *Lodwick v. Catchpole* (a), Judge Buller lays it down that the constable is bound to carry the party before the magistrate, and the magistrate must then examine upon oath, which the constable cannot do. This shews the rule, that a party should be brought before a magistrate, to be a rule of necessity, arising from the circumstance that the constable has no power to administer an oath. The same distinction is taken by Lord Hale, 2 *Hal. P. C.* 79. The magistrate has less power than the constable, inasmuch as he has no power to commit without inquiry; 2 *Hal. P. C.* 109, 110; and Lord Hale's view of the law in this respect, is even more strictly upheld by Lord Coke and Hawkins, who were both of them high prerogative men; 4 *Inst.* 177; 2 *Hawk. P. C.* 135, s. 8; and also by Blackstone in his *Commentaries*, 4 *Bl. Com.* 290. The same is likewise laid down as the law by Lord Camden in the important case of *Rea v. Wilkes* (b). There is a decision also to the same effect in this Court, *Rourke v. Pepper* (c). The law will never go beyond what necessity requires; and as the magistrate is not bound, as the constable is, to interfere in the arrest of a person accused of felony, before an examination on oath, he ought therefore to examine on oath before he exercises his authority, so as not to commit any one unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit; per Justice Bayley in *Cox v. Coleridge* (d); and also *Atkinson v. Carty* (e). The result of all the authorities on the subject is, that whether the constable arrests, or the magistrate commits, each must avail himself of the powers given him by law, and is bound to inform himself by all the means within his power as to the probable guilt of the party. The case of *Beckwith v. Philby*, cited on the other side, is no authority in their favor, inasmuch as the question of the defendant having reasonable cause for suspecting the plaintiff of a felony was left to the jury; and in this instance the judge was not required to leave any such question to them—that was a matter of fact that the defendant's counsel might have insisted on having left to the jury, but they did not insist on it, but that the judge should leave the matter of law to their decision. A magistrate has no right to commit a party to gaol without an examination as to the charge, much less without a warrant in writing. He might have detained him for further examination by *parol*, and the utmost that he could have done would have been, to send him to another magistrate for examination previous to his committal; *Hutchinson v. Lowndes* (f). With respect to the case of *Davis v. Russel*, cited by Mr. Hanna, when compared with the case of *Davis v. Capper* (g), it supports our

(a) Holt's, N. P. C. 483, note.

(b) 2 Wils. 158.

(c) S. & B. 355.

(d) 1 B. & C. 50.

(e) 1 I. & S. 387.

(f) 1 Nev. & Man. 676, 7 Car. & Pay. 542, 546.

(g) 10 B. & C. 32.

view of the law, as the action in the former case was brought against the constables, who were held justified (as we admit them to have been) in their proceedings; while in the latter case the action was brought by the same party, and for the same offence, against the magistrate, whose conduct was held (as we contend it was) to have been illegal. The case also of *Beckwith v. Philby* is distinguished in a very essential particular from this, inasmuch as in that there was an examination of the party arrested before the magistrate, but here the party was never examined at all. With regard to the question that arises on the statute 9 G. 4, c. 54,—in the preamble it is stated that it was passed with a view (among other things) “to define under what circumstances persons may be admitted to bail in cases of felony,” and “to relax in some degree the technical strictness of criminal proceedings, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence.” Thus it appears, that it was passed for the protection of the accused, as well as for the benefit of the public; and the accused in this case was deprived of his just means of defence, as, by a subsequent enactment, he has a right to get copies of the informations at the trial. To have been examined is a privilege, and for the benefit of an innocent man; *Rex v. Derby* (a). And Chief Justice Parker, in the foregoing case, adds, “Nay, in the case of ‘felony, the Justice of the Peace is bound to take his examination;’ and to commit without taking the examination is false imprisonment (b). But the judgment of Lord Eldon, in the case of *Arbuckle v. Taylor* (c), establishes the point for which we are contending beyond all doubt. It cannot be listened to as a justification, that the defendant meant to act honestly. Purposes are to be judged of by acts; and his subsequent conduct proves the intention of the previous committal. The defendant has, therefore, violated every principle of the common law applicable to such a case, as well as the plain and peremptory commands of the statute. And even supposing that the imprisonment could be palliated, what could justify the handcuffing? Nothing but an averment that an escape was apprehended or attempted; and nothing of the kind appears on the facts of this case; *Wright v. Court* (d).

Mr. Tomb, with Mr. Napier.—The bill of exceptions contains two distinct propositions, and on the first only was the Judge called on to leave any question to the jury. The *bona fides* of the transaction has nothing to say to the matter, and that is the only point which the defendant's counsel desired might be left to the jury. The second proposition puts the question on its proper footing, and that is, whether

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(a) Fortescue, 142.

(l) Com. Dig. Imprisonment, H. 6; Hayes, 474.

(c) 3 Dow. P. C. 183.

(d) 6 D. &amp; R. 623, and 4 B. &amp; C. 596.

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a reasonable ground for suspicion subsisted? It is admitted that even a private person is justified in arresting on a reasonable ground of suspicion; but what constitutes such a ground is a mixed question of law and fact: whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy* (a); *Johnson v. Sutton* (b); and therefore the Judge ought to have been directed by the defendant's counsel, if they were dissatisfied with his charge in that respect, to leave the question to the jury, which they have omitted to do. They have held that it was a mere question of law, and as he was not directed to leave both the facts and the credibility of the witnesses to the jury, the exceptions must fall to the ground; *Barker v. Green* (c). But supposing all the facts had been established in evidence, they do not constitute such probable cause as would warrant the defendant in arresting the plaintiff; and even if he were justified in arresting in the first instance, his subsequent conduct has rendered him liable as a trespasser, *ab initio*. There are two kinds of suspicion which may put the magistrate in motion — either that which exists in his own mind, or has been communicated by another: if the latter, it ought to be upon oath; but he has no authority to arrest, merely because the appearance of the suspected person is communicated to him; and Lord Hale, where he treats of *The Hue and Cry*, 103, lays it down, that it is not usual, in any other case, to arrest a person by description of his appearance or dress. But there was no suspicion, properly speaking, in the mind of the defendant; it was mere surmise and conjecture, as appears, first, from his own language at the time of the arrest, — “he may be the man;” — secondly, in not having made out a warrant of committal; and thirdly, the presumption that must have existed of the innocence of the party, in the fact of his having come forward to bail another for the same offence. But even if there had been any justification for the arrest in the first instance, the subsequent conduct of the defendant was illegal, and rendered him a trespasser *ab initio*. The form of the committal, in Chitty's edition of *Burn's Justice*, p. 119, shews clearly what is the law on that subject, viz., that there must be some reason for such committal, and that it must be for a reasonable, and, consequently, a definite time. If the committal was final, it was bad, as having been by *parol*; and if for further examination, it was equally bad, as having been a mere order to take the plaintiff to gaol, without any specification of time or cause. It was also bad, as being hypothetical; and the defendant, as a magistrate, acted altogether illegally

(a) 1 Wils. 232.

(b) 1 T. R. 545.

(c) 2 Bing. 317.

in delegating his discretionary powers to the constable. An examination is not a mere form, but that the accused may have an opportunity of explaining any of the circumstances that create suspicion against him, and of requiring that bail should be taken. The fallacy of the argument on the other side consists in this, that if the arrest be legal in the first instance, all the rest may be legal or illegal.

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Sir *Thomas Staples*, Q. C., in reply.—The defendant is in this case entitled to the benefit of a new trial, inasmuch as, under the circumstances, it is evident that he not only acted *bona fide*, but that he had reasonable grounds for suspicion. A justice of the peace has a clear and indisputable right to arrest on a reasonable ground for suspicion; and it has been contended on the other side, that none such existed in this case; and that even if there had been any probable cause in the first instance, the subsequent conduct of the defendant had rendered the whole proceedings void, and made him a trespasser *ab initio*. As to the former of these positions, it is laid down in 2 *Hal. P. C.* 72, 87, that where a felony has been committed, any person may arrest on reasonable grounds of suspicion; and by 2 *Hawk.* 132, it appears, that in such a case, a justice of the peace is not merely permitted, but *enjoined* to arrest. This is illustrated by the statutes of *Hue & Cry*, 2 *Hal. P. C.* 100, 101, 103. The *Hue & Cry* was part of the common law before the statutes on the subject were passed. 3 *Wms. Justice of the Peace*, 280; 2 *Inst.* 52; and those statutes being now repealed, the common law on that head is re-established. That *bona fides* is the test of the legality of the magistrate's conduct, is laid down in the case of *Ledwith v. Catchpole* (a). A justice of the peace cannot arrest for felony without information on oath, unless the suspicion exists in his own mind; and in such a case no oath can be required, except it be held that he ought to administer an oath to himself. In this instance, a suspicion was generated in the magistrate's mind, by the previous swearing of the wounded man to the appearance of the felon, when he afterwards saw a person answering to that description; and if so, he had not only a right, but he was enjoined to detain him: and having that right he could only have done one of three things—he might have sent him to the wounded man to have him identified, or sent for the wounded man to come to him for the same purpose, or he might have detained him until they could be brought together. Of these, the first was the only feasible plan, as the magistrate would not desert his ordinary business for such a proceeding. The magistrate having had authority to arrest, had also authority to detain him; and the true intent and meaning of the *parol* order (when all the concomitant circumstances are taken into

(a) *Cald.* 291; and *Holt's N. P. C.* 483.

*Saturday, May 30th.*

PRACTICE—VENUE.

NICHOLL and MORRIS v. HICKSON.

Where the venue has been changed on the usual affidavit, and it appears incontrovertibly, that the allegation in the affidavit was untrue, the Court will bring back the venue.

A rule had been granted to change the venue in this case, from Dublin to Kerry, on the usual affidavit, that the cause of action arose in the County Kerry alone, not elsewhere.

Mr. *Fitzgibbon* now moved, on the affidavit of one of the plaintiffs, that the said rule should be discharged, and that the venue should be brought back to Dublin. It was sworn that the statement contained in the affidavit on which the rule was obtained was untrue, inasmuch as the action having been brought on the breach of a covenant in a charter-party, that was executed at Limerick, it was clear that the cause of action did not arise in the county Kerry alone. It was also sworn by the plaintiff, that the principal witness was the captain of a ship, who had been in their service, but had lately left them; and that he could not remain in the county to attend at the Kerry Assizes, but could be present at the Sittings after Term in Dublin; and that if the plaintiffs should be deprived of the benefit of his evidence, the action must be discontinued. Though there are many decisions to the effect that the Court will not bring back the venue in such cases, these are contradicted by others; *Herring v. Durant* (a); *Caillard v. Champion* (b); and the late case of *Roxburgh v. Grimsdale* (c), decided in the Exchequer is in point.—[BURTON J. In that case, the facts stated in the defendant's affidavit were manifestly untrue, on the party's own shewing; and if there is any *incontestible* evidence that the affidavit on which the rule was obtained stated that which was not founded in fact, I apprehend that the Court would bring back the venue.]—The charter-party made at Limerick, and which is the foundation of this action, is evidence incontrovertible, that the cause of action could not have arisen wholly in Kerry, and not elsewhere. Moreover, no affidavit has been made in support of the original affidavit, and in contradiction of ours.

Mr. *Hickson*, Q. C., *contra*, contended, that according to the decided cases both in England and in this country since the New General Rules,\*

(a) 1 Wils. 178.

(c) 2 Jon. 37.

(b) 7 T. R. 205.

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\* By the 47th New General Rule, "venue is made upon the usual Rule, "in cases where an application for a rule to change the "affidavit, the rule shall be made "absolute in the first instance, and

where a rule to change the venue has been obtained, it will not be brought back except under very special circumstances; *Fisher v. Waring* (a); and in this case the special circumstances were not such as the Court will deem sufficient, as it has not been sworn that there are no other witnesses but the one in question, who could prove the necessary facts at the trial; whereas from the nature of the transaction, which was an alleged breach of a covenant in a charter-party to load a vessel, it was manifest that many equally competent witnesses could be procured to prove them.

*Per Curiam.*

Discharge the rule of the 8th of May, and bring back the venue from Kerry to Dublin.

Let the order of the 8th of May be, and the same is hereby discharged, and let the venue in this cause be retained.

(a) 4 Scott. 377.

*Tuesday, June 4th.*

#### PRACTICE—DECLARATION IN EJECTMENT— AMENDMENT.

*Lessee O'BRIEN v. Casual Ejector.*

MR. WALL, on behalf of the plaintiff, applied for liberty to amend the engrossment of a declaration in ejectment, by substituting the name of William for John in the description of the premises, the same having been described as lately in the possession of John Burke, instead of William Burke. The error was merely clerical, but lest it should prove ultimately fatal to the proceedings, it was thought advisable to have the leave of the Court to amend the declaration in that respect. It was an ejectment on the title, and no defence had been taken.—[PERRIN, J.\* I

In an ejectment on the title, an amendment of the declaration permitted before defence taken, by substituting the name of William for John in the description of the premises.

\* *Solus.*

"the venue shall not be brought back except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid." The practice of the Queen's Bench has not been changed by this rule, as in that Court the rule to change

the venue has always been absolute in the first instance; but in the Common Pleas and Exchequer it was the practice to grant only a conditional order in the first instance, which was made absolute if no cause were shewn.

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think you are premature. It will be time enough to make the application when defence is taken.]—The premises are rightly described in every other respect, and the party cannot be prejudiced if served with copy of your Lordship's order before they come in to take defence.

PERRIN, J.

If the amendment is immaterial, you can issue execution at your peril; but if it is a material part of the description of the premises, as I think it is, the alteration may mislead the parties. I shall, therefore, not grant liberty to amend upon an *ex parte* application—no one appearing on the other side.

Mr. Wall afterwards renewed his application to the full Court, and cited the cases of *Lessee Carroll v. Ejector* (a), and of *Lessee Earl of Sandwich v. Casual Ejector*, which is to be found in a note to page 98 of *Longfield's Treatise on Ejectment*; as also the case of *Lessee Irwin v. Strangman*, Exch. Hilary Term, 1825, which is reported in *Stewart's Comments* on the 1 G. 4, c. 87, p. 11, where the amendment was allowed, by altering the name from Isabella to Elizabeth.

CRAMPTON, J.

I do not think the amendment sought can prejudice any person, if they are served with the order of the Court.

PERRIN, J.

When this application was first made, none of these authorities were cited, and I conceived the practice to be as laid down in the note on the practice in ejectment, in *Smith and Butty's Reports*,\* viz., that before appearance, an amendment of the declaration in ejectment will not be permitted. It does not appear that there are any English cases on the subject. However, the authorities now cited are sufficient to warrant the Court in allowing the amendment to be made; and had I been aware of them at the time of the former application, I should have had no hesitation in granting it.

(a) 1 Ir. Law. Rep. 117.

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\* The following is the passage in *Smith & Butty's Reports* to which the learned Judge alluded:—"It is a rule of the Court of King's Bench in England (which would probably be acted on here), that before appearance (which the defence in this Court is understood

to be), the declaration will not be amended. If the engrossment were amended before defence, it must be *without notice*, there being no person to serve notice upon, and it might be productive of great injustice to make such amendments *ex parte*."

*Tuesday, June 8th.*

PRACTICE—AMENDMENT OF PLEA AFTER DEMURRER—  
40TH NEW GENERAL RULE.

HOYTE v. HOGAN.

THIS was an action to try a right of way. The declaration contained three counts, the last of which was for an *asportavit*. To this declaration the defendant pleaded eight pleas, in some of which his title to the easement in dispute was fully set forth, but it was omitted in the last plea (which was a plea to the *asportavit* count), in order to save expense. To this plea a general demurrer had been taken, and, after argument, judgment was pronounced on the last day of the preceding Term in favor of the demurrer. It was now sought to amend the plea, by stating or deducing the defendant's title to the easement, or to file a new plea, on the terms of filing it forthwith, amending the plaintiff's copy, and taking short notice of trial, so that the plaintiff should not be prejudiced by delay.

Amendment of a plea permitted after an argument and judgment on demurrer, where the point was doubtful, although there was no positive affidavit of merits, where the question of merits must be decided on the trial.

Mr. *Robert Andrews*, in support of the motion.—The point that was argued on the demurrer to this plea, though now decided to be law, was pronounced by Lord Denman, in the case of *Richards v. Fry* (a), to be very doubtful, and was considered by the Court, on the late argument, to be one of great difficulty. It was, therefore, a *bona fide* plea. This may not be a very usual application, but the Court can, and do grant it under special circumstances; *Armstrong v. Bayntum* (b).—[CRAMP-  
TON, J. This Court has allowed amendments after argument: *ex gr.* in the *quo warranto* case of *The Queen, at the relation of Darley, v. Smith*, lately decided in this Court.]

Mr. *Macdonagh*, with whom was Mr. *Robert Holmes, contra*.—It is not an usual application for the defendant, who has perilled his case on his pleading, to ask for liberty to amend, and it is never granted, except in an extreme case. 2 *Archbold on Pleading*; and therefore, though we cannot dispute the power of the Court to grant such an amendment, it is clearly laid down that it will not do so, unless where there is an affidavit of merits. *Branch v. Roberts* (c); and the affidavit of merits in this case is wholly insufficient in that respect, it being merely sworn by the attorney in the cause, to the effect, that "as the attorney for the defendant, and from his (deponent's) inquiries, he knows the facts as

(a) 7 Ad. & El. 704.

(b) 1 Scott, 424, and 1 Bing. N. C. 740.

(c) 1 Bing. N. C. 481.

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"well, if not better than the defendant; and saith, that the said defendant has, as he (the deponent) verily believes, a good and just defence on the merits to the action in this cause; and that he (the deponent) believes that serious injustice may be done to the defendant, unless some plea to the last count of the plaintiff's declaration in this cause shall be filed, stating the right of way properly, under which the defendant justifies." This is merely swearing to belief; and the rule of this Court is, that when the attorney makes the affidavit, it must be positive. *Burke v. Keas* (a). Moreover, no injustice can result from the error which it is sought to rectify, inasmuch as the defendant has seven other pleas, on which he will be able to prove his right of way; and would, under the 40th New General Rule, be only liable to the costs on this one count, on which he has no right to speculate, as he is doing by this motion; which, on the other hand, if granted, might and probably will be of great prejudice to us in delaying the trial, as it might be necessary for us to demur to his amendment or new plea. As to the case of *Armstrong v. Bayntun*, the Court, it is true, did permit the defendant to amend his plea after judgment on demurrer against it, but it was upon an affidavit that material facts had since then come to his knowledge. No such pretence is set up in this application, to bring it within the principle of that case, and it is, therefore, rather a precedent in our favor than against us.

Mr. *Andrews*, in reply.—The affidavit need not be positive where the question is one of mixed law and facts, on which it was impossible for the attorney to swear with absolute certainty. If there are no merits, that will appear on the trial, and we shall take nothing by this motion, if it is granted; and all that we are now asking is, that we should not receive injustice on that occasion from a slip in our pleading; for if the plaintiff succeed on one count of his declaration, he is entitled to the general costs of the action, although, by the New General Rules, the defendant may be allowed, on taxation, a set-off of the costs of the pleas on which he succeeds, which in practice are very small indeed.

*Per Curiam.*

This application turns on the question of merits; but as there will be a trial in the cause, that will be decided according to fact, and the costs will follow that decision. The only difficulty in the case arises from the affidavit of merits not being as positive as it might have been. The attorney ought to have sworn to the facts positively, and that he was advised that the law on that statement was in favor of the defendant. However, we consider it, under the circumstances, sufficient to justify a deviation from the general rule on the subject, as laid down in the authorities cited by the plaintiff's counsel; though, at the same

(a) 1 H. & B. 41.

time, in granting the application, we shall give costs to the opposite party, and make it part of the order, that the pleas be filed forthwith, and be confined to the deduction of title, as stated on the preceding pleas.

Let the defendant be at liberty to amend the eighth plea filed by him to the plaintiff's declaration in this cause, or, if necessary, to file a new plea thereto, stating the defendant's right of entry claimed in said eighth plea, upon the terms of the defendant making such amendment or filing such new plea forthwith, amending plaintiff's copy of said plea, or serving him with a copy of such new plea, and taking short notice of trial, if necessary; and let the defendant pay the plaintiff the costs of this motion.

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*Monday, June 8th.*

## PRACTICE—TAXATION—BILLS OF COSTS.

Administrators of GOWER v. DONOVAN.

THE plaintiffs brought an action in Trinity Term 1836, to recover the sum of £6483. 8s. 4½d., claimed by them as due by the defendant to their intestate, who had been a solicitor; and previous to the trial they caused eleven bills, as for costs due to the intestate, to be delivered to the defendant—who was afterwards, at his request, furnished with an abstract containing the amount claimed on each of these bills, and pleaded to the action three pleas, viz., the general issue—the statute of limitations—and a set-off. The plaintiffs called for a bill of particulars of the set-off, which was accordingly furnished to them, and was, for the most part, founded on the recitals and statements in the several bills of costs. One copy of the eleven bills was made out by the plaintiffs for the counsel who directed the proofs, and they afterwards made out two additional copies of the same for the counsel retained for the trial. The case was ultimately referred to and disposed of by arbitration; and when the costs were subsequently taxed by the Taxing Officer (Mr. Hudson), he, in the first instance, allowed the costs of the setting out of these bills in the briefs for counsel, as aforesaid; but on the matter being referred back to him, with leave to make a special report thereon, he disallowed them, on the ground, that upon consulting with his brother Officer (Mr. Clancy), he found that the general practice of the office, from the time of his appointment in 1821, had been to disallow the copies in briefs of an attorney's bill of costs, and of other long bills, in the taxation of the costs of an action to recover the amount of them:

Copies of an attorney's bills of costs are not allowed in the taxation of the costs of an action brought to recover the same.

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and that if he (Mr. Hudson) had been aware of the practice at the time these costs were taxed by him, he would not have thought himself at liberty to have attempted an alteration in it, but would have thrown it on the plaintiffs to apply to the Court in case they considered themselves entitled to the allowance; and accordingly he had altogether disallowed the items in dispute.

Mr. *Tomb*, with whom was Mr. *Nelson*, now moved that the taxation should be allowed, notwithstanding the report of the Officer. They claimed them, not on the general practice of the office as it had been reported, but on the special grounds left open to them, that the counsel could not have done their duty in meeting the plea of a set-off without these briefs setting out the items of the bills of costs; and that the reasons assigned for having disallowed them only applied to the case where *non-assumpsit* alone is pleaded. The Officer is not bound by Mr. Clancy's statement of the general practice—it is a matter in his own discretion to allow or disallow the costs—and accordingly, he has sent us into Court to ascertain whether the principle he proceeded upon in the first instance is correct or otherwise; and that question the Court will, therefore, now take into their consideration, without any reference to what is affirmed to be the general practice.

Mr. *Singer*, on the part of the executrix of the late Mr. *Donovan*, who had been the plaintiff, contended, that according to all the authorities, the report of the Officer was to be considered final and conclusive. In the case of *Blackwood v. Gregg (a)*, draft briefs of depositions and documents selected and abridged were allowed, but *verbatim* copies of long copies such as these, would have been disallowed.

*Per Curiam.*

The ordinary course of the Court is, to adhere to that which is reported by the Officer to be the general practice, and any other would create much confusion. Every case is, in some degree, a special case; and, at all events, there is nothing so peculiar in that before us, as to warrant us in making it an exception from the usual practice of the office, which, according to every authority, is the rule of the Court as to the allowance or disallowance of costs. We shall, therefore, confirm the Officer's report, and make no rule on this motion.

Let no rule be made upon this motion, and let the report of the Officer, and his taxation of the bill of costs therein mentioned, be, and the same is hereby confirmed.

(a) *Hayes*, 514.

*Tuesday, June 9th.*WRIT OF ERROR—AGGRAVATED ASSAULT—SENTENCE—  
SOLITARY CONFINEMENT—JUDGMENT REVERSED.

HOLLAND and Wife, in Error, v. The QUEEN.

THIS case came before the Court, on a writ of error on the judgment pronounced against Philip Henry Holland and Frances his wife, prisoners in the county gaol of Limerick, who were tried at the last Spring Assizes, on twelve several and distinct indictments—which may be divided into two classes—six of them for assaulting Mary Anne Alcock, and six of them for assaulting Henry Pujolas, both of whom lived in their house as servants. In the first indictment they were charged with a malicious assault upon the former on the 20th of September 1839, and for thirty successive days, so as to endanger her life. The second indictment charged Philip Henry Holland alone with the same offence; and the third charged Frances alone; the fourth, fifth and sixth were the same as the first three, except that they confined the offence to the 20th of September 1839 alone. The other six indictments were against the prisoners in like manner as the preceding, except that the offence was charged as against Henry Pujolas. Each indictment contained three counts, one for an assault so as to endanger life, another for doing grievous bodily harm, and the third for a common assault. They were tried and convicted; Philip Holland being acquitted on the first count of the six first indictments for an assault on Mary Anne Alcock, and also on the seventh, eighth, tenth and eleventh indictments for an assault against Henry Pujolas; and Frances Holland being acquitted on the first count, and found guilty of all the others as far as Mary Alcock was concerned. Having been found guilty, they were sentenced by Mr. Justice PERRIN, as follows—“That Philip Henry Holland and Frances his wife should be imprisoned in the gaol of the County of Limerick for the space of nine calendar months, to be kept in solitary confinement one week in every six during that period, and that Philip Henry Holland should pay £500 to the sheriff for the use of her Majesty.” A writ of error was sued out against this judgment on four grounds—first, that by the said judgment the prisoners were adjudged to suffer solitary confinement, whereas such sentence ought not to have been passed on them for such an offence; secondly, that the judgment thus pronounced against them is joint, and not against each severally; thirdly that there being several indictments charging them with separate offences, the judgment does not appear to be a joint one against those separate offences; and fourthly, there being distinct indictments, and not distinct records, but all summed up in one instead of several judgments, such is illegal and contrary to law.

Where two persons (a man and his wife) were found guilty of an aggravated assault, and the sentence of the Judge was, that they should be imprisoned for the space of nine calendar months, to be kept in solitary confinement one week in every six during that period, and to pay a fine of £500,—on a writ of error it was *Held*, that the part of the sentence that awarded solitary confinement was bad, as having been unknown as a punishment to the common law, and unauthorized by any statute, as regarded the particular offence of which they had been convicted. It was also *Held*, that where a sentence is bad in part it is bad in the whole, and must be reversed.

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Mr. *Coppinger*, in support of the objections.—The Court in looking to the indictments would find that they were framed under the 10 G. 4, c. 34, s. 29, which was an act passed for the punishment of violent assaults. The first question that arises is, whether the punishment awarded was such as they were liable to, in consequence of the crime of which they have been found guilty? The 29th section of the act means, that persons found guilty of doing grievous bodily harm are liable to be transported for seven years, or imprisoned for three, with or without hard labor; and on the face of the statute, therefore, it is manifest, that solitary confinement has not been awarded for the offence in question; and the question then arises, whether, by any other statute, or by the common law, this punishment could be inflicted for an assault? The crime of grievous assault was created by statute, and would otherwise have merged by the common law into a common assault, and therefore, unless the Crown can shew some statute referring specifically to this offence, and adding solitary confinement as a punishment for it, I submit that this being a penal statute, and, therefore, to be construed strictly, it gives no warrant for such a sentence. As to the common law, there are certain crimes, such as treason, murder, &c., for which fixed punishments have been established from time immemorial; and there are other crimes, the punishment for which has always been left to the discretion of the Court. If it should be contended, that it was in the nature of that discretion to award, if the Judge thought fit, the punishment of solitary confinement, it will not be difficult to satisfy the Court that no such discretion exists, and that their discretion amounts to nothing more, than the exercise of it on sound principles of law, in awarding such punishments as are well known. In searching the old authorities it will not be found that solitary punishment was known to the ancient law—on the contrary, if we look to the acts that have been lately passed, and to what has been written on crimes and punishments, we shall find it to be a punishment of recent creation, and has been made the means of doing away with others more revolting, but less efficacious. Thus Paley, though not a legal authority, in his *Moral and Political Philosophy*, c. 9, on crimes and punishments, observes—"Of the reforming punishments not yet tried, none promise so much as solitary confinement." By that it would seem to be a new punishment invented for the amendment of the culprit. Unless, therefore, some statute exists which enjoins solitary confinement, the prisoner could not have been subjected to it at common law. In *Blackstone's Commentaries*, 377, 388, the circumstance that every crime known to the law is subjected to a fixed punishment independent of the will of either the Judge or the jury, is held up as one of the glories of the English Constitution; and Lord Kenyon, in *Wilson v. Rastall* (a), and Lord Mans-

(a) 4 T. R. 757.

field, in *King v. Wilkes* (a),—the former in a civil, the latter in a criminal case—define what the discretion of the Court should be—not arbitrary, vague and fanciful, but legal and regular. Prior to the passing of the Bill of Rights (1 W. & M. ss. 2), parties had sometimes punishments inflicted on them that were unknown to the laws of the land, but by that bill it was declared that no punishment to be inflicted should exceed the offence, and that neither cruel nor unusual punishments should be resorted to; and in 2 Hawk. P. C. 634, it is laid down that a Judge is not authorised by letters patent merely to inflict penalties, but that he must be guided by acts of parliament, and not pass any sentence unknown to the laws. If, therefore, the Crown cannot shew that the sentence of solitary confinement was an ancient one at common law, it is for them to shew that it is one by statute, and had reference to the particular offence of which the prisoners in this instance have been found guilty. We contend that it is an unusual punishment with respect to this offence, and that, therefore, there was an error in the judgment pronounced, which must, on that account, be reversed, and the parties become accordingly entitled to their discharge. Now, as to the statute law on the subject, solitary confinement was unknown to the common law of the land, and was created by act of parliament as a punishment for the commission of some particular crimes. It may be said by the Crown, that prisoners are not entitled to have companions in prison; but if the statute law recognises solitary confinement as an aggravated species of punishment for refractory prisoners, it cannot be considered as an ordinary punishment to which all persons may be subject; and this is clear from the provisions of the English act, 4 G. 4, c. 64, and of the Irish act, 7 G. 4, c. 74, passed for the regulation of prisons, which provide, that competent cells should be built for the punishment of *refractory* prisoners; and it also provided in the 42d section of the English act, that if criminals should be guilty of any offence contrary to the rules of the prison, the same should be reported to the visiting Justices, who are empowered to make inquiry on oath, and sentence the person accused, if proved guilty, to one month's solitary confinement. These two acts afford an answer to the assertion that no prisoner is entitled to have company in gaol: and so great was the punishment of solitary confinement considered, that whereas, by the 9 G. 4, power had been given to impose it generally, that was limited by the 1 V. c. 90, which prescribed that the time should not exceed one month at a time, nor more than three months in the year. The section giving power to inflict this mode of punishment was passed before the act which created the offence of which the prisoners were found guilty—one being the 9 G. 4, and the other the 10 G. 4. The 9 G. 4 confines the

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(a) 4 Burr. 2539.

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punishment of solitary confinement to offences committed under that act; and if, by the 1 V., it was the intention of the legislature to continue it for the crime of which the prisoners were found guilty, it would have introduced it, more particularly as it recites the offences of the 10 G. 4; and the omission clearly shews the intention of the legislature to have been, that solitary confinement should not be awarded in such a case. In the recent statute 2 & 3 V. c. 77, relating to assaults in Ireland with sticks, stones, and loaded weapons, a punishment is prescribed for these particular offences; and though grievous the crime may be, the legislature did not conceive that such a sentence imposing solitary confinement should be introduced. In fact, the first statute that gives solitary confinement as a punishment is the 1 G. 4, c. 57, which was passed for the abolition of whipping in the case of females; but as whipping is no part of the sentence here, solitary confinement cannot be said to be substituted for it. If then, it be an unusual punishment created by statute, it cannot be inflicted without the authority of statute; and such not having being the case in the present instance, the judgment was erroneous and ought to be reversed. It may be contended further, that should such be the case, the prisoners could be sent back to the Assizes and tried over again; but if the Court rule that the judgment is erroneous, they must discharge the prisoners altogether. In 3 Inst. c. 101, p. 210 (the chapter on Judgments and Executions), it is laid down, that "if the judgment be erroneous "all the proceedings are to be set aside." In two recent cases, *King v. Ellis* (a), and *King v. Bourne* (b), the authorities on this subject were sifted, and the decision at which the Court arrived was, that they had no power to amend an erroneous judgment, but that it must be reversed; and, therefore, if the judgment in this case is held to be erroneous on the first ground, it must be reversed, and the parties discharged. Moreover, there being but one judgment on twelve indictments, charging twelve separate crimes, and that judgment being pointedly against both, it is bad in law; for if one of the prisoners should be again indicted for the same offence, he or she could not plead this conviction; and if we pleaded *autrefois acquit*, we should be answered, that the judgment was a joint judgment and could not be applied to this new case. It is, therefore, submitted to the Court, that on matter appearing on the face of the record, and on the judgment, it is manifestly erroneous, and that we are entitled to have the judgment reversed, and the prisoners discharged.

Mr. Bennett, for the Crown.—If not inconvenient to the Court, I shall, in the first place, apply myself to the last question put by Mr. Coppin-

(a) 5 B. & C. 395.

(b) 7 Ad & El. 58.

ger, viz., that because there were several indictments, some joint and some separate, and but one judgment, that the whole was bad.—Surely, it could not be contended, that it was necessary to have twelve records (one on each indictment) on the return to the writ of *certiorari*; but if we can satisfy the Court, that there is one good count, every thing else may be rejected as surplusage, and the Crown would be entitled to have judgment. The Court will bear in mind, that every count was a separate indictment; and in the case of *King v. Kingston* (a), six persons were charged on different indictments, and it was held good: also in *Chit. Crim. Law*, 249, 254, it is laid down to be no objection, that separate offences are charged against prisoners—each count being a separate charge in itself—it might be good ground for an application to the discretion of the Court to quash the indictment, but it cannot be made ground of objection after judgment pronounced, and after all the different counts went by consent to the one jury. If an offence sufficient to maintain the indictment be well laid, it is enough, though other facts are ill laid, *Queen v. Ingram* (b); and *King v. Levi* (c); and it is no objection in arrest of judgment, that the indictment contains several charges of the same nature, *Young and others* in error v. *King*, (d); and in *Com. Dig. Judgment, N.* it is held, that if the offence appears on the indictment, it is sufficient.—[CRAMPTON J. The objection is not to the indictment, but to the judgment.]—If I shew that we have one good indictment warranting the judgment, it will not be vitiated by fifty bad ones, or even good ones.—[CRAMPTON J. Have you got a precedent, where a single judgment is given on separate indictments?]—There are no authorities on either side, and therefore the question must be decided on principle; and we maintain that nothing of surplusage can vitiate the record, where there is one good count warranting the judgment. *Com. Dig. Indictment, N.* We now come to the second, which is Mr. *Coppinger's* first point; and my principle is, that in cases of aggravated misdemeanors, a wide discretion was vested by the common law in the Judges—a discretion, however, that was not to exceed well ascertained limits. We cannot contend that there is any act of parliament authorising this sentence for this offence, and, therefore, we must justify it as authorised by the common law. In 2 *Hawk. c. 48, s. 14*, it is laid down, that punishments are to a certain extent discretionary; and in 1 *Chit. Crim. Law*, 710, it is stated as a general rule, that for all offences at the common law not regulated by particular statutes, the punishment is discretionary; and in a case in 3 *Chit.* 822, the Court will find, that whipping, in the case of a highly aggravated misdemeanor, was inflicted; and also in *Cro. Car.* 507, where there was a conviction for an aggravated

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(a) 8 East, 41.

(b) 2 Salk. 384.

(c) 2 Stark. 41.

(d) 3 T. R. 98.

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assault, the prisoner was sentenced to the discretionary punishment of standing in the pillory, with a sword in his hand, and a tin kettle on his head. There is also a case to the same effect quoted by Judge Buller, in *Young and others v. The King* (a), where the prisoner (Count Villeneuve) was convicted and sentenced to hard labor on the Thames. The punishment of the pillory cannot be traced to any act of parliament, nor whipping in the case of an aggravated misdemeanor. There are acts, it is true, which bind the Judge to pronounce a certain sentence, but they do not apply to this case. In *The King v. Thomas* (b), the Court, on an affidavit of a woman, that corporal punishment or the pillory would endanger her life, sentenced her to confinement, declaring that they were not tied down to any particular punishment in cases of misdemeanor. The meaning of solitary confinement is, merely to be kept away from the other prisoners; and I admit that the Court could not lay on the punishment of an offence of a higher degree. The cases of *The King v. Bourne* and *The King v. Ellis*, that have been cited to prove, that if a sentence is wrong it warrants the discharge of the prisoners, do not establish that principle, as in those cases there was no law for the sentence pronounced; and therefore there could have been no discretion in the breast of the Judge: nor are all the counts in these indictments under the statute, for the third count in the seventh indictment, which contains all the aggravation of the offence, does not conclude against the statute. There might be a case requiring a Judge to enforce separate confinement in his sentence; and will it be contended that he has no power to do it? And that separate confinement is, moreover, contemplated by the common law, is evident from the duty of gaolers, as laid down in 3 Co. 44, "that he is to keep his prisoners in *salvo et arcto custodiâ*"—"salvo" meaning securely, and "arcto" separation from communicating with others. But even if the Court should be of opinion that the judgment is bad as to the part of it which refers to solitary imprisonment, that part of the sentence may be corrected, and the remainder allowed to stand good; and for authority that the Court may thus reverse the sentence as to part, I refer to the case of *Collier v. Cape* (c), which rules that a sentence may be good in part and bad in part.

Mr. *Freeman*, in reply.—The principle which ought to regulate sentences was well defined by the common law, and the abuse of it expressly guarded against by the Bill of Rights; and Mr. *Bennett's* propositions are not sustained by any authority, otherwise they would overthrow the now well established principle, that punishments are

(a) 3 T. R. 105.

(b) Cas. temp. Ld. Hardwicke, 278.

(c) 1 Wils. 312.

defined. The counsel for the Crown having now given up the justification of this sentence on the statute law, I shall therefore go into the question on the common law. In *Terms de la ley*, imprisonment is defined to be, "no other thing but the restriction of a man's liberty;" and in 3 *Bracton*, 105, we find, "*Carcer est ad continendos non puniendos*;" and *Dalton's Justice of the Peace*, tit. *Judgment*, 522, shews that *Coke's* definition of the duty of a gaoler, as quoted by Mr. *Bennett*, does not uphold such a discretion in him as would empower the infliction of solitary confinement; for in the next sentence is defined the words "*arctá*" and "*salvá*," viz., "without conference with others, "and intelligence abroad." But the 3 *Inst.* 219, is stronger than *Dalton*, and refers to the passage in *Bracton*, in stating the different kinds of punishment which justices are authorised to inflict, and warns them not to exceed their powers to sentence. Fine and imprisonment are declared to be the common law punishment for offences of this nature. The case quoted by Mr. *Bennett* from 3 *T. R.* 105, does not countenance the position, that punishments are, in cases of aggravated misdemeanor, discretionary, as it appears that the sentence there awarded was for an offence under 33 *Hen.* 8, c. 1, which expressly authorises "any corporal punishment, except death or torment." We now come to the proposition, that a sentence bad in part is bad in the whole; and on this subject, the case of *Casey v. Hartnet*, decided by the Twelve Judges last Term, shews how far the principle has been extended by the Irish Bench, as there, the mere omission in the sentence of any direction to dispose of the body of the convict after execution, was held to vitiate the whole sentence, and to entitle the prisoner to be discharged. In *Wulcot's Case* (a), it is laid down by Chief Justice Holt, that where the laws of England appoint a punishment for an offence, there is no discretion left with the Judge to vary it; and that the word "discretionary" in such cases, is but a softer name for "arbitrary;" whereby he means, that judgments are discretionary as to *quantum*, not as to quality. In 1 *Hal.* 13 and 19 also, it is laid down, that the laws of England are determinate, and leave but little to the *arbitrium* of the Judge. As to the question of solitary confinement being a distinct and recognised species of punishment from that which is ordinarily termed separate confinement, with which the counsel for the Crown have attempted to confound it, the greater part of the Reports on Prison Discipline to the House of Commons is taken up in drawing this very distinction between separate and solitary confinement; and the statutes that have been lately passed, in pursuance of these Reports, recite, that the punishment of solitary confinement is grievous, and provides for its remission to a certain extent. Nor can the judgment stand good as

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(a) 4 Mod. 395.

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Frances his wife be imprisoned in the county gaol of Limerick for nine months, and that they be put into solitary confinement one week in every six weeks; and that Philip Henry Holland pay a fine of £500 to the Sheriff for the use of her Majesty. There were many objections pointed to the manner in which the record was made up, but it will not be necessary for us to advert to them, as there is another objection that we consider fatal to the judgment—and that is, that the sentence pronounced was not merely a sentence for nine months' imprisonment, but it was also, that the prisoners, during a certain portion of that time, should suffer the additional punishment of solitary confinement. It was admitted, during the argument, that such a punishment for such an offence was not warranted by the statute law of the land, and that, if it is to be defended, it must be defended as legal by the common law. This led to a discussion as to what was solitary confinement, and whether it was to be considered as a distinct punishment at all, or a part of the system of prison discipline, which exercised a wholesome influence over the conduct and morals of persons suffering confinement for the species of offence of which the prisoners have been convicted. We are of opinion, that it cannot be so interpreted—it has been introduced by a statute so recent as the 7 & 8 G. 4. into the criminal laws of the country, by the name of solitary confinement or imprisonment, and distinctly specifying it as a punishment which might be pronounced, or inflicted on persons, for a particular class of offences, amongst which the offence of which the prisoners have been convicted is not to be found. The sentence that has been pronounced follows precisely the words of the statute, with the exception of the time awarded to be spent in solitary confinement; and it is evident that the mistake of the Court arose from a conception, that the case before it was to be found amongst that class for which solitary confinement was awarded by the statute. It is our opinion, that the sentence was not warranted by the common law; it is therefore illegal, and the judgment must be reversed. We are not to be understood, as giving any opinion with regard to the manner in which the record has been made up.—[His Lordship observed, that he was requested by Mr. Justice CRAMPTON (who was unavoidably obliged to be absent), to state his concurrence in the decision to which the Court had come].

BURTON, J., concurred in the opinion of the Court.

PERRIN, J.

Having been the Judge who pronounced the sentence in this case which has been reversed, and in the reversal of which I perfectly concur, I think it necessary to make a few observations on the case, in addition to those which have fallen from the LORD CHIEF JUSTICE. I am clearly

of opinion that the Court cannot inflict any new or unusual punishment, and that such a proceeding would be against principle and the Bill of Rights—and that too, whether the punishment is new or unusual altogether, or new and unusual as applied to the particular offence. The Court is bound to award a punishment appropriate to the offence; but that must be the usual or ordinary punishment, as directed by statute or by the common law, indicated by usage or practice. I fully concur in the observations which have been made in the course of the argument, as to the propriety of a Judge always abiding by precedents, and not introducing novel punishments. The amount or quantity is left to the discretion, or, more properly speaking, the judgment of the Court—that discretion, however, is not an arbitrary discretion, but one to be governed and guided by the common law of the land, and by precedent, or warranted by statute, with regard to the degrees of guilt, and circumstances of aggravation. Solitary confinement is not a punishment known to or recognised by the common law, but has been introduced by statute as an additional punishment in aggravation of imprisonment, and is a more severe form of punishment than mere incarceration; and I do not concur with the observations of the *Attorney-General*, that it can be considered as a separate confinement—it is not so—in my view, it is a very different thing. It was first introduced by 1 G. 4, c. 57, as a substitute for whipping in the case of females; and it has, since then, been applied to various other cases, but the application is expressly confined within certain fixed limits, not to be exceeded; and this is a fair inference from the fact, that the legislature have declared, that it is only to be applied in fixed quantities, so that no Judge can award it for five successive weeks, or for a period exceeding in the whole three months; and in fact, it is only in particular instances that the Judge is authorised to award it at all. But still, I cannot coincide with the observations of the learned counsel for the prisoners, that the sentence was either cruel or unusual, inasmuch as it is recognised by several acts of parliament, and applied in many instances of the same character, or, at all events, nearly akin to that offence of which the prisoners have in this case been convicted. Such an argument is not to be listened to—it is a legal and constitutional, and not a cruel and unusual punishment; and not only that, but it is a most wholesome secondary punishment, when applied at short intervals; and more especially, when it is awarded to persons of education, it cannot be considered as entitled to the character given of it. Nor, looking to the facts of this case, is the sentence at all a severe one. I did not award it under a notion that the punishment was one recognised by the common law, or that I had any authority for pronouncing it except by statute, and under the supposition that the 10 G. 4, directed that particular mode of punishment for malicious assaults, or for inflicting

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grievous bodily harm; and I was led into that erroneous opinion by having consulted a wrong index to the statutes, instead of applying to the section itself in the body of the act, as I ought to have done, or probably by a reliance on what was still more fallacious, my own memory. The statute of the 10 G. 4, does not warrant solitary confinement, and that of *Vict.*, which amended certain sections of that statute, does not alter it in this respect. The common law, under which the third count was framed, does not permit the punishment, and there is no case where it has been applied to other misdemeanors; at all events, authorities for such a principle are not to be followed or extended. The question then is, does any other statute enjoin it as a punishment for this offence? The 1 G. 4, permits it to be substituted in lieu of whipping, but only in the case of females; and it expressly provides that it shall not be extended to males—whether, therefore, it could have been applied with respect to one of these prisoners is a question, but it certainly could not with respect to the other. The punishment, therefore, could not be adopted under the 1 G. 4; and I am clearly of opinion, on the entire of the case, that solitary confinement ought not to have been awarded, when not expressly authorised by statute, and that, therefore, the judgment is erroneous;—at the same time I may observe, that the case cited from *Wilson's Reports* cannot be strained to sustain the proposition that has been contended for by the Crown, nor could it be taken to the extent there laid down. If the punishment is illegal the judgment is not awarded by law, and the only means of correcting it is by a writ of error; and if it is found to have exceeded in any particular the limits prescribed by law, it is bad on the whole; and *The King v. Bourne*, and a succession of authorities have decided that the Court has no power to pronounce a new judgment, but merely to reverse that which is erroneous. But for the two cases of *The King v. Bourne*, and *The King v. Ellis*, I should be strongly inclined to take the view that was taken by Mr. Justice PATTERSON, in the former case, notwithstanding the passage in 3 *Inst.* 210; but the matter has been there decided, and we are bound by that decision. I am, therefore, quite satisfied, that my mistake in pronouncing the judgment has rendered the whole nugatory, and the Court are consequently bound to reverse it, and to order that the prisoners be discharged.

Let the judgment be reversed.

*Friday, June 12th.*

**SPECIAL AGREEMENT—DECLARATION—SPECIAL  
DEMURRER—UNCERTAINTY.**

**CUMMINS and NEWBERRY v. KENNY.**

THE declaration in this case stated, "For that whereas heretofore, &c.,  
"the plaintiffs and the defendant had been engaged as partners in  
"running certain coaches between the towns of Armagh and Belfast,  
"and the towns of Portadown and Dungannon. And whereas the  
"coach which was so employed running between the said towns of  
"Armagh and Belfast, during the aforesaid period, belonged to the  
"said plaintiffs, but was horsed as to that part of the said line, between  
"Belfast and Lurgan, by the said plaintiffs, and as to the part of the  
"said line between Lurgan and Armagh, by the said defendant; and  
"the coach which was so employed in running during the aforesaid  
"period between the said towns of Portadown and Dungannon,  
"belonged to and was horsed by the said defendant, to wit, at Lur-  
"gan aforesaid. And whereas during the aforesaid period it had  
"been arranged, that the said plaintiffs should receive out of, and on  
"account of the aforesaid establishment, the one full half of all shares  
"paid for carriage along the whole extent of each of the said lines, that  
"is to say, the one full half of all the fares paid for carriage between  
"Belfast and Armagh, or between Belfast and Dungannon, the said  
"plaintiffs paying one half the expenses of coachmen and guards along  
"the said line, and should also receive the whole of all the fares paid  
"for carriage between Belfast and Lurgan, or along any part of the line  
"between the said two last mentioned towns; and that the said defend-  
"ant should receive out of, and on account of the aforesaid establish-  
"ments, the remaining full half of all fares paid for carriage along the  
"whole extent of each of these lines, he paying the remaining half of  
"the expenses of coachmen and guards along the said line, and should  
"also receive the whole of all the fares paid for carriage between  
"Lurgan and Armagh, or Lurgan and Dungannon, or along any part  
"of the said coaches' lines between the said three last mentioned towns.  
"And whereas, afterwards, to wit, on 13th of February 1839, at  
"Lurgan aforesaid, by an agreement then and there made between the  
"plaintiffs and the defendant, the said plaintiffs and the defendant did  
"agree, that from and after the 1st day of February then instant, they,  
"the said plaintiffs and defendant, should respectively keep their said  
"several coaches, and that the defendant should receive one-half of all  
"fares and money received from Belfast to Armagh, and should pay a  
"proportionate part of the expenses of guards and coachmen; and it

Where an  
agreement was  
stated in the  
declaration,  
and that the  
"said plain-  
"tiffs (two)  
"and defend-  
"ant did  
"thereby bind  
"themselves  
"in a penalty  
"of £200, that  
"they would  
"continue  
"their estab-  
"lishment for  
"one year  
"from the  
"date;" and  
the breaches  
assigned were,  
"that the de-  
"fendant did  
"not and  
"would not  
"continue the  
"aforesaid  
"establish-  
"ments, nor  
"co-operate  
"with the  
"plaintiffs in  
"continuing  
"the said es-  
"tablishments  
"for the said  
"period of one  
"year - *Held*,  
that the decla-  
ration was  
bad on special  
demurrer for  
uncertainty.

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"was further agreed that the said plaintiffs were only to receive a proportionate fare to Dungannon, according to Armagh prices or fares; and the said plaintiffs and defendant did thereby bind themselves in a penalty of £200, that they would continue those establishments for one year from that date; and the said agreement being so made, afterwards, to wit, on the 13th day of February, 1839, &c., in consideration that the said plaintiffs, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised to the said defendant to perform all things in the said agreement contained on their part to be observed and performed, the said defendant undertook, &c., and the said plaintiffs, in fact, say that they always have from the time, &c., performed and fulfilled all things therein contained on their part, &c., yet the said defendant not regarding, &c., did not and would not perform the said agreement and undertaking on his part, but thereby craftily and subtly deceived the said plaintiffs in this behalf, to wit, that he, the said defendant did not, and would not continue the aforesaid establishments for the said period of one year in the said agreement mentioned, but, on the contrary thereof, &c. And the said defendant further disregarding his said agreement, would not co-operate with the said plaintiffs in continuing the said establishments for the said period of one year, but on the contrary, the said defendant, afterwards and before the expiration of said period of one year, to wit, &c., discontinued his own share of the said establishment, and then and there stopped and detained the coach of the said plaintiffs, and prevented them from continuing their portion of the said establishments, and then and there established, and still continues to keep up a rival coach in opposition to the said former establishment, whereby the plaintiffs have been deprived of the profits and advantages which they might and would otherwise have made by the continuance of the said establishment, and were forced to have another coach at great expense, to wit, &c., for the conveyance of the passengers between the aforesaid towns of Lurgan and Belfast."

There was another count, which did not differ in any material respect from the foregoing. To both of these counts the defendant demurred specially, and assigned several causes of demurrer.

Mr. *Molyneux*, in support of the demurrer.—The first objection that we make is, that the agreement mentioned in the declaration being between the plaintiffs and the defendant as partners, and in relation to partnership transactions, the Court has no jurisdiction. It is stated to have been made between partners, and even if not so expressly stated, it would be considered a partnership transaction. *Fromont v. Comp-*

*land (a)*. The agreement also, which is the foundation of the action, is unintelligible and ambiguous—it does not state that the parties were bound to each other; and *non constat*, but that they were bound to a stranger. Moreover, it does not appear on the face of the contract, how they should keep their several coaches, or what is meant by keeping them; nor does it appear what the nature of the establishment is that is to be kept up; nor does the breach state which of the two agreements it refers to. We also object to the declaration on the ground of duplicity, inasmuch as the setting up of a rival coach is a distinct cause of action, on which the plaintiffs might recover damages.

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Mr. *Nelson* and Mr. *Tomb*, in support of the declaration.—As to the first objection, that the action is not maintainable by one partner against another in a Court of Law, the proposition is true in a certain sense. The profits to be divided cannot be settled in a Court of Law, but there is no case or principle to establish, that of two men agreeing to form a partnership, one cannot bring an action against the other for a breach of that agreement; on the contrary, it has been held, that in such a case an action is maintainable. *Venning v. Leckie (b)*; and *Owston v. Oyle (c)*;\* 2 *Saund. on Plead. & Ev.* 762. In fact, if there is not a remedy in a Court of Law, there can be none in a Court of Equity, as such a Court could not enforce a continuance of the agreement, or award damages for the breach. As to the next objection, that the agreement is unintelligible, and that it does not appear to whom the parties were bound, the agreement, or rather the contract, is perfectly intelligible, though perhaps not, strictly speaking, technical; and we shew distinctly what part each of the parties were bound to perform, while the penalty is in the nature of liquidated damages on one side or the other. The agreement is between certain parties, and to whom could it be presumed they were bound, except to each other? As to the next objection, your Lordships are perfectly aware of the meaning of the terms “keeping an establishment,” and the nature of the establishment to be kept up is manifest on the face of the declaration. Nor can the objection for uncertainty in the breach and duplicity be sustained; for the promises are not referred to the agreement—at all events, they must be referred to the last agreement—and the setting up of a rival coach is mere surplusage, and alleged for the purpose of aggravation of damages.

Mr. *Molynaux*, in reply.—It would be impossible for the jury to give

(a) 2 Bing. 170.

(b) 13 East, 7.

(c) 13 East, 538.

\* *Vide* the case of *Gage v. Leckie*, 2 Stark, 107, which seems more in point than any of those cited above.

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damages without entering into the partnership accounts, as there is an express allusion to the division of fares, and the payment of guards and coachmen by the defendant, which is to be a deduction from the profits. The case of *Green v. Beasley* (a) fully establishes the principle for which I am contending.—[PERRIN, J. You must reverse the proposition in that case of *Green v. Beasley*, and if it holds good, it would be an authority for you.—CRAMPTON, J. If it required a previous account to be gone into, in order to measure the damages, your argument would be good.]—The construction of the contract, though not the exact words, is, that the guards and coachmen were to be paid out of the profits; and if there happened to be no profits, they would have to divide the loss. With respect to the other grounds of objection, there is nothing on the face of the declaration, to shew, that the agreement was between the plaintiffs on the one hand and the defendant on the other, insomuch, that if it had been an agreement between the parties severally, it could not have been stated differently. As for the objection on the score of duplicity, it cannot be got rid of on the ground, that the setting up of a rival coach can be rejected as surplusage—the objection being not for duplicity in the breach, but for a joinder of two distinct causes of action in the same declaration.

The CHIEF JUSTICE (after having stated the first count, and the alleged breach, which did not differ materially from the second, as regarded the objections to it).

This demurrer must be held good, on the ground of uncertainty in the agreement, as set forth in the declaration; and because that the breaches assigned are vague and uncertain. The substance of the breach is, that the defendant did not, and would not, continue the aforesaid establishment, and that he would not co-operate with the plaintiffs in continuing the said establishments, in the said agreement mentioned, for the said period of one year. The only stipulation in the agreement was, that the plaintiffs and the defendant bound themselves in the penalty of £200 to continue these establishments for one year; but whether this was intended to be binding, as between the three parties on each other severally, or on one of the parties, with respect to the other two, or whether they were all three bound to a fourth person, does not appear. There is only one penalty mentioned, and whether the defendant has become liable to pay that to the plaintiffs, on the breaches assigned, is not apparent from any thing on the face of the declaration. We cannot intend any thing for the pleader; and if that engagement is binding on the plaintiffs severally, this breach is wrongly pleaded. We therefore allow the demurrer on this ground, without saying any thing of the other causes of demurrer that have been assigned and argued.

Allow the demurrers.

(a) 2 Bing. N. C. 108.

Friday, June 12th.

DEMURRER—ACTION OF COVENANT—SURRENDER AND  
ACCEPTANCE—REPLICATION—DUPLICITY.

PURDON v. DICKSON.

THIS was an action on a covenant contained in a lease made by the plaintiff to the defendant—the demise was for three lives, with the usual covenant for the payment of the rent. The declaration set out the lease and covenant, and alleged, as a breach, that “after the making of the said indenture, and during the said term thereby granted, to wit on, &c., a large sum of money, to wit, £68 of the rent aforesaid, became and was due, and still is in arrear and unpaid to the said plaintiff, contrary to the tenor and effect, the true intent and meaning of the said indenture, &c.” To this declaration seven pleas were put in, and to the six last of them replications were filed by the plaintiff. The defendant demurred to these replications; but as the questions to be argued arose on the replications to the second and fifth pleas, it will not be necessary to set out the others.

The second plea was, *Actio non*—“because that after the making of the said indenture, and before any part of the said rent became due and payable to the said plaintiff, to wit on, &c., she, the said defendant, by a certain deed, then and there duly signed by her, and sealed with her seal, and which said deed having been lost by time and accident, the said defendant cannot produce the same to the Court here, did surrender to the plaintiff the term then to come and unexpired of and in the said demised premises, with the appurtenances, and all right, title and interest in and to the same; which said surrender, he, the said plaintiff, did then and there accept, and this she, the said defendant is ready to verify, &c.

The fifth plea was, *Actio non*—“because that after the making of the said indenture, &c., it was agreed by and between the said plaintiff and the said defendant, that the said defendant should quit and deliver up to the said plaintiff, and that the said plaintiff should take possession of the said demised premises with the appurtenances, and that in consideration thereof the said defendant should be discharged from all liability to pay any further rent, which would otherwise become due in respect to the said premises, after the said 29th of September 1837. And the said defendant saith, that in pursuance of the said agreement, she did afterwards, to wit on, &c., quit and deliver up the possession of the said demised premises to the said plaintiff, and the said plaintiff did then and there accept such possession thereof, in pursuance of the terms of the said agreement and

In an action of covenant for rent due, the defendant pleaded a surrender of the premises, and that the plaintiff accepted the same, to which the plaintiff replied, that the defendant *did not surrender* and that he (the plaintiff) *did not accept* the same,—to which the defendant demurred for duplicity. Held, that the surrender and the acceptance constitute but one entire matter of defence, and that therefore the replication is good.

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"in discharge of the liability of the said defendant to pay any further rent for the said premises; and the said defendant, on the day and year aforesaid, accordingly, entered into and upon the said message, and hath thenceforth hitherto remained in the possession thereof; and the said tenancy, and defendant's interest in the said demised premises was thereby then and there determined and put an end to; and this she is ready to verify, &c."

To these pleas the following replications were put in:

"And the said plaintiff, as to the said plea of her the said defendant by her secondly above pleaded, saith, &c., because that the said defendant did not by any deed whatsoever *surrender* to the said plaintiff all the term then to come and unexpired of and in, &c., nor did the said plaintiff *accept* the said surrender in manner and form as the said defendant hath also in her said second plea mentioned, &c.; and this the plaintiff prays may be inquired of by the country."

"And the said plaintiff, as to the plea by the defendant fifthly above pleaded, saith, &c., because she, the said defendant, did not in pursuance of the said agreement in the said last plea mentioned, quit and deliver up the possession of the said demised premises to the said plaintiff—nor did the said plaintiff then and there accept such possession thereof, in pursuance of the terms of the said agreement, and discharge of the liability of the said defendant; nor did the said plaintiff then and there enter upon the said demised premises, in manner and form as in the said fifth plea mentioned; and this the said plaintiff prays may be inquired of by the country."

To these replications the defendant demurred, and assigned as cause for demurrer, that they were double, in having put several and distinct matters in issue.

Mr. *Napier*, in support of the demurrer.—These replications are clearly double, inasmuch as in the replication to the second plea two distinct matters are averred—first, an act by one party, viz., a surrender by deed by the defendant; and second, an act by the other party, viz., an acceptance of that surrender. In the *Year Book*, 5 H. 7, p. 7, ca. 14, there is a case of an action of debt on a bond conditioned for the performance of an award; to which the defendant pleaded, that no such award had *been made, nor delivered* to the party; and a demurrer to that plea was held good, on the ground, that the award was one thing, and the delivery another. In this case no surrender would have been an answer to the plea, and so would no acceptance. Thus in *Steph. on Plead.* 308, 2d ed., the case is put, of the delivery, and acceptance of a pipe of wine in satisfaction being pleaded, and lays it down, that the plaintiff cannot reply, that it was neither delivered, nor accepted in satisfaction—for this would be double. And *White v. Reeves* (a) is

(a) 2 B. Moore, 23.

another instance of such a replication having been held bad for duplicity. The general rule, therefore, is clear, that the issue must be knit on a single point; and to this rule there can only be two exceptions—first, where the negation of each involves necessarily the negation of the other; and, secondly, where the matter traversed amounts to an excuse only for the non-performance of an obligation or duty, otherwise binding; *Hawthaw v. Rawlings* (a) is an illustration of the first of these, and a similar principle is laid down by Tindal, C. J., in *Webb v. Weatherby* (b). But our case cannot be brought under either of these two heads.—[PERRIN, J. Can there be a surrender without an acceptance?]—The surrender divests the estate out of the surrenderor, and vests it in the surrenderee, “before notice or agreement thereto;” *Terms, de la ley. Surrender*. The surrender and the acceptance are distinct matters, and either of them may be traversed. It is a strong point in our favor, that all the precedents of replications that are to be found in the books, traverse the surrender alone, *vide Thursby v. Plant* (c); none of them take in more than one of the averments, and in 2 Saund. 305, b. n. 13, it is stated, that where a surrender of a lease for years is pleaded, and that it was agreed to by the lessor, it is not necessary to say that he entered. In *Fitzh. nat. brev. Barre. pl. 262*, we are furnished with a further test of the materiality of the acceptance: for if it be a mere inference it could not be traversed; and yet in the case there mentioned, where it was pleaded that the defendant surrendered, and the plaintiff accepted, issue was taken on the acceptance.—[CRAMPTON, J. In that case it was not stated that it was a surrender by deed.]—It is true, that in the notable case of *Thompson v. Leach* (d), it was held, that by the execution of a deed the estate vested at once; and it must be admitted, that an issue on a deed of surrender would try the question of implied assent; but it is different where an action is brought in express disaffirmance of the acceptance; *Com. Dig. Surrender, N. Year Book, 9 Edw. 3, Hil. T. ca. 16*. Whatever is traversable, and not traversed, is admitted; *Hudson v. Jones* (e); therefore, an issue on the surrender by deed by the defendant, would not involve the acceptance by the plaintiff, for the implied assent is rebutted by the action brought. We are to prove two things on the face of the pleadings.—[PERRIN, J. Two things, both of which are necessary for one defence.]—Not for one defence, but for a surrender. The real test is, that they could have traversed the surrender only, and we would not be bound to prove the acceptance in such a case. The analogy of livery implied in a feoffment is not sound, because livery is

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(a) 1 Str. 23.

(b) 1 Scott, 477.

(c) 1 Saund. 236, c.

(d) 3 Mod. 296.

(e) 1 Salk. 91.

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the act of the grantor, and it is necessary to complete the grant. Both the surrender and acceptance are substantial things, and essential to our case, but we are not to be put to the proof of them; otherwise, as in the case of the pipe of wine, we should be obliged to prove both the delivery and the acceptance. The object of pleading is to bring the matter to a single issue; *Bardons v. Selby* (a). As to the second exception, the subject has been much discussed of late in the English Courts since the New Rules, by which the plea *de injuria* is permitted in *assumpsit*; and there it has been held, that if the plea is in discharge you cannot reply *de injuria*, but if it is in excuse of a legal liability, you can; *Isaac v. Farran* (b), and *Parker v. Riley* (c). But in our case the matter cannot be in excuse, the action having been discharged by the surrender, as by it the covenants in the lease were avoided; *Duchess of Chandos v. Brownlow* (d). As to the replication to the fifth plea, we admit, that it would have been held bad, if a special demurrer had been taken to it, inasmuch as it did not state that the surrender was by deed; but that objection cannot be now sustained, as it has been decided in the case of *Tilson v. Warwick Gas-light Company* (e), that the omission to set out a deed, even in the case of a deed being absolutely necessary, was a mere matter of form, and therefore, ground for special demurrer only. On this authority, therefore, it must be intended, that the agreement was by deed, and then it will operate as a release or discharge of liability—not an admission of liability, and excusing the non-performance.

Mr. Collins, Q. C., and Mr. Freeman, in support of the replications.—These demurrers cannot be sustained on any precedent or principle that can be found, either in the older or more recent authorities. The general principles of double pleading are laid down in *Steph. on Plead.* 272; and it is a well established rule of law, that no matters, however multifarious, will render a pleading double, if they form in their combination one distinct proposition; *Bac. Ab. Pleader, K. 2*, and *Robinson v. Raley* (f), which case goes as far as any counsel on our side could expect. The single point of defence is that the lease had terminated, and Mr. Napier has argued that the acceptance is necessary and material to the surrender; but we have him in this dilemma—the acceptance is either material or immaterial; if material, it is a necessary part of the single proposition, the termination of the lease, and we had a right to traverse it; if immaterial, it is mere surplusage, and cannot make the pleading double; *Steph. on Plead.* 421. That an acceptance is not essential to

(a) 3 B. & Ad. 12.

(c) 3 M. & W. 230.

(e) 4 B. & C. 962.

(b) 1 M. & W. 68.

(d) 2 Ridg. P. C. 406.

(f) 2 Burr. 316.

a surrender, has been decided in the important case of *Thompson v. Leach* (a), and if not essential it is mere surplusage; also, the definition of surrender in *Co. Litt.* 337, b, shews that a surrender could not be made except by agreement; and as a surrender of corporeal hereditaments might have been made by *parol*, previous to the statute of frauds, it must then have been made by mutual agreement, and so it is laid down in *Saunders' Note*. This case is analogous to the plea of "*ne unques executor*," and the replication, that he was executor, and administered; *Rast. Ent.* 322, 1 *Went.* 200. We have merely taken issue on two facts which amount to the one defence, and Lord Mansfield laid it down in *Robinson v. Raley*, that it is not necessary that the single point of defence should be a single fact. In the case also of *O'Brien v. Saxon* (b), the three distinct facts of an act of bankruptcy, the trading, and the petitioning creditor's debt, were held to constitute but one entire proposition, and it was decided that the replication was good. In the case of *Selby v. Bardons* (c), the plea *de injuriâ*, &c., putting several facts in issue, was held good, and the same case was revived in *Webb v. Weatherby* (d). In the case of *Grinnam v. Legge* (e), Mr. Justice Baily remarks, that "where there is an express contract between the parties none can be implied;" therefore, though we have not demurred to the fifth plea, as we might have done, the defendant has no right to imply that the surrender was by deed, as a special agreement is there stated. Moreover, the substance of the plea is matter of excuse, as the party in it excuses herself for not performing her covenant.

Mr. Cooper, Q. C., in reply.—The fifth plea is the most material of the pleas in this case, and the defendant was bound to plead all the facts mentioned therein, but the denial of any of them would have been sufficient for the plaintiff; for instance, if he had proved that the defendant did not quit and deliver up the premises as stated, there would have been an end of the plea, and so of the others. Suppose she had quitted, and he did not enter; she is still liable for the rent. It has been argued, that a surrender *ex vi termini* implies an acceptance, and the case of *Thompson v. Leach* has been rested on, as the foundation of that position; but in that case Baron Ventriss was driven to say, that the surrender was for the benefit of the surrenderee, and on that account it was, that the law would imply an assent on his part; the whole of the argument was built upon that proposition. But in this case, can it be said, that it is for the benefit of the plaintiff to get rid of a good lease? Holt states in the note of his judgment in *Thompson v. Leach*

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(a) 3 Mod. 296.

(b) 2 B. & C. 908.

(c) 3 B. & Ad. 9.

(d) 1 Bing. N. C. 502.

(e) 8 B. & C. 325.

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(as given in *Shower's Reports*), "that a surrender is a particular sort of conveyance, and an agreement is necessary to perfect it." The first decision in *Thompson v. Lerch* was sound, and supported by all the Judges, except Ventris (who argued the case), and was reversed by the Lords against their opinion; so that it is open to much doubt whether the first opinion of the Judges is not the better law. When an action is brought in disaffirmance of the surrender, the lessee ought to shew that the lessor assented to it, but the omission is aided by verdict. In *Robinson v. Raley* (as appears by the note on the case in *Buller's Nisi Prius*), the plea claimed a general right of common, and all the facts stated in the replication were necessary to shew that the cattle were commonable cattle, and for that purpose any one of them separately would not have been sufficient, and this general form of plea rendered all those averments necessary. At all events, Lord Tenterden's opinion, as stated in *Selby v. Bardons* (a), comes in collision with that of Lord Mansfield in *Robinson v. Raley*, and I rely on the opinion of the former, as being the best pleader of the two.

BURTON J.

The objections taken to the replications, which have been demurred to in this case, are for duplicity; and it has been conceded, that the question to be decided by the Court arises on the replications to the second and fifth pleas—the latter of which differs from the others, in that it does not aver that the surrender was made by deed. The other pleas and replications, therefore, it is not necessary to mention. The replication to the second plea traverses both the surrender of the premises by the tenant, and the acceptance of that surrender by the landlord, and so does the fifth; and the same objection has been made to both, viz., that they are double; the defendant contending, that the plaintiff should have taken issue on one only of the averments, and the plaintiff, on the other hand, contending, that both of the facts stated in the replication, though apparently distinct, converge to the one point, making the defence amount to this, that there had been no valid surrender of the premises, and that the defendant was bound to prove his whole defence—not only the surrender on his part, but the acceptance on the part of the other—and that, therefore, the replication was right in taking issue on the entire defence that had been set up. It is true, as a general position, that the rules of pleading require that issue should be taken on one point, and that the replication should consist of a single proposition; but to the latter part of this proposition there is an admitted exception, and that is, where the plea consists of matter in excuse, and the

(a) 3 B. & Ad. 17.

leading doctrine on the subject is thus laid down in one of the regulations in *Crogate's Case* (a), "The general plea *de injuriâ sud propriâ*, &c., "is properly, when the defendant's plea doth consist merely upon matters "of excuse, and of no matter of interest whatsoever." But in such cases the defence is still limited to a single point, though, as Lord Mansfield observed in *Robinson v. Raley*, "it is not necessary that this "single point should consist only of a single fact." The cases, moreover, of *O'Brien v. Saxon* (b), and *Selby v. Bardons* (c), are exemplifications of this doctrine. The most frequent occurrence of such replications *de injuriâ* is in cases of trespass, but in the latter case of *Selby v. Bardons* it has been held, that it is applicable to the action of replevin. There is nothing, therefore, to prevent the application of this principle to the case in question: that case is not, however, the case of a replication in the general form, which is commonly known by the appellation of the replication *de injuriâ*, and which is entitled a general plea, as it is in the nature of the general issue: this is not exactly such a case as that; nor is it to be governed by the same rule; but it is a case on which traverse is to be taken to one matter of defence only, and the single question before the Court is, whether the replication is the traverse of one entire matter of defence, or otherwise? With respect to this, if it were an action of covenant brought in disaffirmance of the surrender, it ought to be shewn in the replication that the lessee surrendered, and that the lessor assented to the surrender, *Com. Dig. Surrender, N.*; and the principle on which this can be done is established not only by Lord Mansfield in the case of *Robinson v. Raley*, but in many subsequent cases. It has been contended, that there could not be a complete surrender without an acceptance or assent; and that, consequently, the averment of such is a necessary part of the defence; and that, therefore, the traverse of both the covenants, viz., of the surrender, and of the acceptance of that surrender, is but the traverse of one only matter of defence, and not open to the objection of duplicity; and this position seems to be well founded on the authority of *Webb v. Weatherby* (d). That case, if it were necessary to resort to it, confirms this doctrine, both on principle and by an analogy perfectly exact, inasmuch as the defence there was, that there had been a payment and an acceptance of the money, both of which were held to constitute but one matter of defence. I confess that the case of payment and acceptance appears to me to be precisely analogous to that of a surrender and an assent, and as the objection in the former case was overruled, so must it be held in this case to be untenable. The traverse is a traverse of the entire defence, and if there

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(a) 8 Co. 133.

(b) 2 B. & C. 902. and 3 Tyrw. 430.

(c) 2 B. & Ad. 2.

(d) 1 Bing. N. C. 502.

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were no other cases to be found in which the same principle was established, I should be perfectly satisfied to rest on that case; but it is also established, not merely by the decision in *Robinson v. Raley*, but by the language of Lord Mansfield in his judgment on that case, where he lays it down, that if there are more facts than one necessary to one defence they may be pleaded. Moreover, the defence here is matter of excuse, and seems, therefore, quite conformable with precedent, as far as it is necessary for us to resort to the principle admitted in the case of the plea *de injuriâ*. A question was raised whether the plaintiff's acceptance of the surrender was material or immaterial to its validity:—it is unnecessary for us to say any thing on that subject here—but the point was well put by Mr. *Freeman*, that if the averment were material, it was a necessary part of the defence, and they had a right to traverse it, according to authority; but if, on the other hand, it were immaterial, the traverse of it was mere surplusage, and the issue cannot be prejudiced by it; and besides that, the immateriality was not assigned as a cause of special demurrer.

PERRIN, J.

I think the principle laid down in *Robinson v. Raley* is sufficient to rule this case; and I prefer relying on it, rather than on *Crogate's Case*, as well because it is a later and more distinct authority, as because we thereby avoid embarrassing ourselves with the principles of the plea *de injuriâ*. The authority of *Robinson v. Raley* has been assailed and questioned by the Counsel who argued in support of the demurrer, but it cannot be shaken:—it was the judgment of the full Court, and has always been recognised as established law. There was also a distinction attempted to be taken between that case and the one now before us, on the assumption, that the plea there was a general plea of a right of common, and that it was, therefore, necessary to shew, that the cattle were commonable cattle, which was not alleged in the plea; but a plea shewing the species of cattle must have been set up, or no such traverse as was taken in that case would have been taken. Moreover, the report of the same case, in *Buller's Nisi Prius*, shews that there must have been an averment in the plea of the species of cattle. The principle, as ruled by Lord Mansfield, was acknowledged by Mr. Justice Patteson and Mr. Justice Parke, in the case of *Selby v. Bardons*; and they considered themselves bound by it; and also in the cases of *O'Brien v. Saxon*, and *Bardons v. Selby*, which was decided in the Exchequer Chamber. But it may be said these were actions in *tort*, and that there is a distinction between cases of contract and of *tort* in this respect. There is, however, no foundation for any such distinction; for all of these cases were argued on the general grounds, whether many facts constituting but one entire proposition, may not be traversed.

Moreover, the case of *Brogden v. Marriott* (a) was an action of *assumpsit*, as also were the cases of *Webb v. Weatherby* and *Isaac v. Ferrar*. Therefore, it equally applies to actions of contract as *tort*. It was also sought to shake the authority of *Thompson v. Leach*; but on that point it is not necessary to make any other remark, than that it is a case too well established to be now questioned, and that any attempt to do so must be as vain, as it is rash.

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BURTON, J., stated, that the LORD CHIEF JUSTICE and Mr. Justice CRAMPTON, who were unavoidably absent, concurred in the judgment of the Court.

Let the demurrers be overruled.

(a) 2 Bing. N. C. 475.

Monday, June 15th.

PRACTICE—LIBEL—VENUE.

HALL v. M'KERNAN.

MR. MONAHAN, Q. C., applied to the Court, on the part of the defendant, to change the venue from the county Leitrim to the county Galway. The action had been brought for alleged defamation, and the defendant swore, that the plaintiff is a surveyor of the county of Leitrim, and, consequently, has much influence with the persons on the record panel, who are generally road contractors, and obliged to submit their work to the plaintiff, and procure his approval of the manner in which it has been done, before they receive payment for it. It was further stated, that those not already road contractors expect to be so, or are the friends of such as are, and, consequently, likewise subject to the plaintiff's influence; and, that therefore, the deponent could not expect a fair trial in Leitrim.

The venue will not be changed on the ground that the plaintiff is a county surveyor, and is on that account possessed of influence with the jurors.

Mr. John B. West, Q. C., opposed the motion. The affidavit was an additional libel. It would be a strong precedent to establish, that because a gentleman is a county surveyor, he is not entitled to have a cause, in which he is a party, tried by a jury in that county.

Per Curiam.—They might as well say, that the venue ought to be changed in the cases of a stipendiary magistrate, a physician, or even an influential attorney, being plaintiffs. We must, therefore,

Refuse the motion, with costs.

PRACTICE—EJECTMENT FOR NON-PAYMENT OF RENT—LIBERTY TO AMEND AFTER DEFENCE TAKEN.

Lessee RUSSELL v. TUTHILL.*

The declaration, defence, and other proceedings in an ejectment for non-payment of rent, permitted to be amended by striking out the name of one of the lessors of the plaintiff upon the terms of giving security to the defendants for costs.

MOTION for liberty to amend the declaration in ejectment for non-payment of rent.—The lease sought to be evicted, was a lease of certain premises in the city of Limerick, made in 1810, for three lives with a covenant for perpetual renewal. Hughes Russell, one of the lessors of the plaintiff, was named as a trustee in the will of the original lessor, and the other co-lessors of the plaintiff were his devisees.

Defence was taken by Tuthill, who was heir-at-law of Jeremiah Tuthill the lessee in the lease of 1810, and also by Francis Philip Russell, who was in the actual possession of the premises at the time of the serving of the ejectment, and had been so for many years before.

The cause being at issue, the defendants were called on by notice for a consent that Hughes Russell, who took no estate under the will, might, notwithstanding that he appeared as a party on the record, be examined as a witness for the other lessors of the plaintiff, and security for costs was offered to the defendant. This proposition was refused by Francis P. Russell, and an application was now made to the Court for liberty to amend the declaration by striking out the name of Hughes Russell, he having no estate or interest in the premises, and his testimony being necessary to enable the co-lessors to recover. Security for costs was offered by the notice. The application was grounded on an affidavit stating the foregoing facts.

The motion was made by Mr. *Bennett*, Q. C. (with whom was Mr. *O'Leary*), for the lessors of the plaintiff.

Mr. *Fitzgibbon* appeared and opposed the motion on behalf of Francis P. Russell, one of the defendants.

BURTON J.

This is a very proper case for making the amendment sought by the notice.—It can do the defendants no injury.—No doubt, their security for costs would be diminished by striking out any of the lessors of the plaintiff, but the notice offers sufficient security for costs. And in this Court such an application is almost of course, even in an ejectment for non-payment of rent.

CRAMPTON J. concurred.

COURT.—Let the lessors of the plaintiff have liberty to amend the declaration, defence, and other proceedings had in this cause, by striking out the name of Hughes Russell, wherever it may occur in same, upon the terms of the lessors of the plaintiff forthwith giving security to the defendants for costs in the cause.

No costs of the motion to either party.

* This case was decided in Trinity Term 1839, but was accidentally omitted in its proper place.

EXCHEQUER OF PLEAS.

*Monday, January 27th.*PRACTICE—JUDGMENT AS IN CASE OF A NON-SUIT—
SUFFICIENCY OF CAUSE AGAINST.

TUTHILL v. BRIDGEMAN.

Mr. KELLER moved for liberty to enter up judgment as in case of a non-suit, the cause having been at issue more than three Terms.

On the day upon which notice of this motion was served, the plaintiff furnished a peremptory undertaking to go to trial at the next Limerick Assizes, but made no offer to pay the costs then incurred.—[PENNEFATHER, B. The plaintiff ought to have offered to pay the costs incurred up to the time of furnishing the undertaking to go to trial.]—A mere undertaking to go to trial is not of itself a sufficient answer to this application. In compliance with the words of the statute (*a*), the plaintiff should have shewn some “just cause” why he had not proceeded to trial according to the course of the Court.

The undertaking to try the cause is only the “reasonable terms” which the Court will impose on a plaintiff, but the statute requires that he should also assign some “just cause” for his delay. Such is the view of the statute taken by the Court of Queen’s Bench in this country, in the recent case of *Gilman v. Connor* (*b*), in conformity with the English decisions. In *Nicholls v. Collingwood* (*c*), it was held that the plaintiff must shew some excuse, and that the defendant is not obliged to accept merely a peremptory undertaking. The decision in *Walter v. Buckle* (*d*), is to the same effect. In 2 *Archbold’s Prac. by Chitty* (*e*), it is laid down, that “in addition to the peremptory undertaking, the plaintiff should also shew to the Court ‘just cause’ for his not having “proceeded to trial.”

By the practice of this Court a peremptory undertaking to go to trial at the next sittings or assizes, is considered as “just cause” against a motion for judgment as in case of a non-suit.

PENNEFATHER, B.*

The act of parliament is not imperative; therefore what amounts to “just cause” is a matter within the discretion of the Court,—and this

(*a*) The 28 G. 3, c. 31, s. 2, 1r.; 14 G. 2, c. 17, Eng.

(*b*) 1 Ir. Law Rep. 346. As to what is considered by that Court a sufficient cause against the application, see *Anon. ante* pp. 167-263; and—*v. Worthington, ante* p. 266.

(*c*) 2 Dowl. Pr. C. 60.

(*d*) 2 Chit. 244.

(*e*) p. 808; see also 2 Tidd, p. 266, 9th ed.; and *Ellison v. Coath*, 2 Price, 16.

* *Solus.*

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TUTHILL
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Court has always considered a peremptory undertaking to go to trial at the next Sittings or Assizes as "just cause" against an application for judgment as in case of a non-suit.

I am not disposed to follow the authorities which have been referred to, and see no reason to change what has hitherto been the settled practice of this Court.

No rule on this motion, on the terms of plaintiff's undertaking to go to trial at the next Assizes, and to pay the costs of this motion within a week after the taxation of the same; and if the undertaking be not given, and the said costs paid within that time, let defendant be at liberty to enter up judgment as in case of a nonsuit.*

* In *Mallett v. Hilton*, 2 H. Bl. Rep. 119, the Court of Common Pleas in England held, that in all cases where an application was made, *for the first time*, for judgment as in case of a nonsuit, it was sufficient, in answer to such an application, to undertake peremptorily to try, without alleging any reason for not having before tried

the cause; and declared that, whatever might have been the former practice, in future, it should be understood, that *the first motion* for judgment as in case of a nonsuit, was only a mode of obtaining a peremptory undertaking to try. *Vide* 2 Tidd, 768, 9th ed.; Imp. C. P. 388, 4th ed.

Thursday, February 15th.

SITTINGS AFTER HILARY TERM.

Coram Woulfe, Chief Baron.

PRACTICE—*DISTRINGAS JURATORES*—JURORS—
CHALLENGE TO THE ARRAY—DEMURRER.

WATERS v. HUGHES.

Where the defendant in a city cause challenged the array of the panel, because six days before the first day of the *Nisi Prius* sittings, the jurors empannelled were not, nor was any of them, nor any juror of the county of the city, &c., summoned to serve upon the jury for the trial of the issue in that cause, by virtue of any writ of *venire facias*, *distringas*, &c.; a demurrer taken to the challenge was overruled.

THIS case having been called on for trial, counsel for the defendant tendered a challenge to the array. The challenge, which was engrossed on parchment and signed by counsel, was in the following form—"And now at this day, to wit, on the 1st day of February, in the year of our Lord 1840, comes as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury empannelled also come; and thereupon, the defendant challengeth the array of the said panel, because he says that six days before the said 1st day of them, nor any juror of the county of the city, &c., summoned to serve upon the jury for the trial of the issue in that cause, by virtue of any writ of *venire facias*, *distringas*, &c.; a demurrer taken to the challenge was overruled.

"of February, in the year last aforesaid, the said jurors so empannelled
 "as aforesaid, were not, nor was any of them, nor any juror of the county
 "of the city aforesaid, summoned to serve upon the said jury for the
 "trial of the issue in this cause, by virtue of, or in pursuance of, any
 "writ of *venire facias*, *distringas juratores*, or other writ, or order in
 "that behalf made, or given, according to the form of the statutable
 "enactments in that case made and provided. And this the said defend-
 "ant is ready to verify, whereupon he prays judgment, and that the
 "said panel may be quashed."

The plaintiff's counsel objected to the challenge for the want of a stamp. It was contended that being a law pleading it ought to have been stamped as such.

The COURT having intimated that time would be given to procure the necessary stamp, the following demurrer was put in on the part of the plaintiff—"And the said plaintiff as to the challenge of the said defendant saith, that the said panel ought not to be quashed, because he saith that the said challenge, and that the matters therein contained, in manner and form as the same are in the said challenge stated and set forth, are not sufficient in law to authorise or warrant the quashing of said panel, and that the said plaintiff is not bound by law to answer the same; and this he, the said plaintiff, is ready to verify; wherefore, by reason of the insufficiency of the said challenge in this behalf, the said plaintiff prays judgment, and that a jury of the said panel may be sworn, and soforth."

Joinder in demurrer.

Mr. John Brooke, Q. C., in support of the demurrer.—The case of *Gillespie v. Cuming* (a), on the authority of which, no doubt, this challenge has been taken, so far from sustaining it, is an authority the other way; for there the challenge averred that the jurors had not been summoned by virtue of any *distringas* in any cause for the Assizes; but here the ground of challenge is, that the jurors were not summoned for the trial of the issue in this particular case. But, independently of that case, it has been expressly decided by this Court that it is not a cause of challenge to the array that the jury have not been duly summoned; *Edwards v. Harding* (b).

CHIEF BARON.—That was a decision under the old law; besides, I look upon it as overruled by the decision in *Gillespie v. Cuming*; but there certainly is the distinction you mention between the form of the challenge in the latter case and of the one in this.

His Lordship here called on the defendant's counsel to support their challenge.

(a) *Ante*, p. 28.

(b) *Vernon & Scr.* 99.

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WATERS
 v.
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Mr. West, Q. C., and Mr. Rolleston for the defendant.

The defendant is entitled to judgment on this demurrer upon two grounds—first, it is submitted, that according to the true construction of the 12th and 18th sections of the 3 & 4 W. 4, c. 91,* the jurors ought to be summoned in every case.—[CHIEF BARON. I find upon inquiry that it is not the practice that a fresh summons should be served upon the jurors every time a fresh *distringas* is delivered to the sheriff; but that where the jurors have once been summoned on a particular *distringas* delivered to the sheriff in sufficient time, they are afterwards summoned anew in each case upon the delivery of every new *distringas*; and I see no reason why there should be such a *toties quoties* summoning of the jury. On the contrary, I think, for the reasons suggested by Baron PENNEFATHER in the case of *Gillespie v. Cuming* that such need not and ought not to be the practice.]—It is observable that Baron PENNEFATHER in that case abstained from expressing any opinion on the point. But conceding the law to be as stated, it follows that the jurors here have not been summoned in any one case in time; for had they been duly summoned in any one case they must, according to the argument on the other side, have been duly summoned in this. But the challenge avers the contrary—and the truth of that averment is admitted by the demurrer. If any *distringas* had been delivered in proper time, that ought to have been made the matter of counter-plea and not of demurrer. This challenge, although in a more restricted form, is substantially the same as that in *Gillespie v. Cuming*; and a similar challenge has been very recently held good by Chief Justice BUSHE in the case of *The Dundalk Railway Company v. Gray (a)*. Indeed the restricted form of challenge seems more correct than the enlarged one.

Mr. Fitzgibbon, in reply.—On the part of the plaintiff we altogether impugn the decision in *Gillespie v. Cuming*, and contend that an objection founded on the want of a summons to the jury does not form the subject of a challenge to the array. Although there is a similar act in England (6 G. 4, c. 50), there is no instance to be found in the English books of an objection to the panel, or a challenge to the array, on the ground that the *distringas* had not been delivered to the sheriff, or the jurors summoned in proper time. In none of the books of practice is such enumerated among the causes of a challenge to the array. In *Archbold's Practice by Chitty (b)*, the causes of challenge are minutely stated, and all of them savour of some supposed or suspected partiality or default in the sheriff who arrays the panel (c). It is the duty of the

* See these sections, *ante*, pp. 32, 33, *note*.

(a) Since reported, Crawl. & Dix. C. C. 333.

(b) p. 457, 6th ed.

(c) See 3 Bl. Com. 359.

sheriff to return *tardè*, if the *distringas* be not delivered to him in sufficient time to enable him to summon the jurors six days previously to the *Nisi Prius* Sittings or Assizes; but if he do not return *tardè*, neither party can object to the jurors when they appear in the box.* If the defendant be damnified or delayed by the default of the sheriff, he has his remedy against him by action. The 18th section of the 3 & 4 W. 4, c. 91, is merely directory, and the act contains no declaration that an omission to summon the jurors six days before the Sittings or Assizes shall render such summoning void; nor does the act contain any thing to make that omission the ground of a challenge to the array. There is nothing in the 18th section that requires the sheriff to summon the jurors in every case; his duties would be most onerous were he obliged to do so.—[CHIEF BARON. There I agree with you, and am disposed, as I have already said, to adopt the observation thrown out by Baron PENNEFATHER upon that point in *Gillespie v. Cuming*. I have no hesitation in saying, that I will be guided by that case; and, even if I had any doubt on my own mind, I should feel myself bound by that decision sitting here at *Nisi Prius*.]—Admitting *Gillespie v. Cuming* to be good law, it is not necessary to overrule it in order to decide against the challenge here, which is totally distinct in its form from the challenge in that case.

The CHIEF BARON, having conferred with Barons PENNEFATHER and RICHARDS in Chamber, made the following observations, upon his return to Court:—

I have consulted with my Brothers PENNEFATHER and RICHARDS, and they agree with me in considering the challenge good, and in thinking that the demurrer must be overruled. This challenge is in substance as large as the one in *Gillespie v. Cuming*—for the gist of it is, that no jury were summoned competent to try the issue in this cause. Now, I am of opinion that if the jurors had been duly summoned under any *distringas*, they would have been a good jury, and competent to try the issue in the present case. In short, my learned Brethren concur with me in thinking that the challenge here is, in effect, the same as that in *Gillespie v. Cuming*, and that the decision in that case ought to be acted on in this.

Demurrer overruled.†

* Sed vide *Lessee Barton v. Quinn*, Batty, 552.

† See the case of *Keogh v. Walker*, in the C. P. ante, p. 210.

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WATERS
v.
HUGHES.

Wednesday, January 22d.

PRACTICE—CHANGING VENUE ON SPECIAL GROUNDS—
6 G. 4, c. 51.

BOYSE v. SMYTH.

In an action by an attorney for the recovery of a bill of costs, the venue was changed, before plea pleaded, to the adjoining county from the county of the city of L., in which the venue was laid, upon an affidavit that a fair and impartial trial could not be had there.

MR. COOPER, Q. C., on behalf of the defendant, moved that the venue be changed from the county of the city of Limerick to the county of Clare or the county of Limerick, being the next adjoining counties to the said city of Limerick.

The affidavit of the defendant stated, that the action was brought for the recovery of a bill of costs, amounting to the sum of £1054. 6s. 7d.; that the plaintiff was and had been a resident attorney of the city of Limerick for upwards of thirty years, in extensive practice in the said city, and possessing considerable influence amongst the class of persons from whom the jury for the trial of civil business were selected. That he had been informed and believed that the jury in the city of Limerick were limited in number, and that deponent was convinced he could not have a fair and impartial trial in the said city of Limerick, and that a more satisfactory trial would be had in the county of Limerick or the next adjoining county of Clare, than in the said city of Limerick.

Mr. Cooper.—The 6 G. 4, c. 51, s. 2, enacts—"That in every action, "whether the same be transitory or local, which shall be prosecuted or "depending in any of his Majesty's Courts of Record in Dublin, if the venue "in such action be laid in any county of a city, county of a town, or town "corporate within Ireland, it shall and may be lawful for the Court in "which such action shall be pending, at the instance of any plaintiff or "defendant, to direct the issue or issues joined in such action to be tried "by a jury of the county next adjoining to such county of a city, county "of a town, or town corporate, if the said Court shall think fit to do "so."—[PENNEFATHER, B. This being an application to change the venue on special grounds regularly it ought not to be made before plea pleaded. It is inconvenient to discuss a motion which depends on the issue to be tried, before issue has been joined.*]—In *Weatherby v. Goring* (a); *Bohrs v. Sessions* (b), and some other cases, it is true, the Courts refused to allow the venue to be changed before issue joined; but those were all actions on *specialties*, in which respect they are distinguishable from the present. If the plaintiff mean fairly, he can have no objection to let this case be tried by a jury of the adjoining county of Limerick.

(a) 3 B. & C. 552; 5 D. & R. 541.

(b) 2 Dowl. P. C. 699.

* See acc. *per* Bailey, J., *Cotterill v. Dixon*, 1 Cr. & M. 661.

Mr. Bennett, Q. C., and Mr. D. R. Kane, *contra*.

This motion is untenable for two reasons.—First, it is contrary to the rule of practice, whereby an application to change the venue on special grounds is required to be made after issue joined, and not before; *Archb. Prac. by Chitty*, 1007, 6th ed., where the rule is represented as a general one.*—Secondly, it is casting an improper imputation on the character of the jurors of the city of Limerick.

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BOYSE
v.
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Per Curiam:

We do not consider it as casting any imputation whatever on the character of the jurors of the city of Limerick. We understand the defendant merely to say that the plaintiff, from his professional intercourse with a certain class of persons, has acquired considerable influence in a particular district—now if the Court be of opinion that the circumstance of this gentleman having so long practised as an attorney in the city of Limerick may have given him a peculiar influence there, it appears to us, that without imputing to the plaintiff any corrupt intention to exercise an undue influence over the minds of the jurors on the one hand, or imputing to the jurors any corrupt liability to succumb to such influence on the other, we may make an order that the case shall be tried in a more neutral district. Besides, it has not been suggested on the part of the plaintiff that there is any likelihood of there being an unfair trial in the county of Limerick, or that he is likely to suffer any injury from the venue being removed there. In transitory actions, the Court has jurisdiction in such cases to change the venue, quite independently of the statute.

With respect to the other objection, there is no inflexible rule upon the subject. Although the motion has been made at an inconvenient time, we ought not, perhaps, to expose ourselves to the still greater inconvenience of having it discussed on another occasion.

Let the venue be changed from the county of the city of Limerick to the county of Limerick. No costs of this motion.

* See *Mathews v. Gregg*, 2 Law Rec. 3 Ser. 276; *Bank of Ireland v. Stewart*, 2 Law Rec. 2 Ser. 179; also *Hill v. Payne*, 3 Dowl. P. C. 695; *Youde v. Youde*, 4 Dowl. P. C. 695; *Mulvany v. White*, *ante*, p. 33.

Thursday, January 30th.

PRACTICE—CHANGING VENUE ON SPECIAL GROUNDS.

**SCANLAN and Wife, Administratrix of E. FITZMAURICE, deceased, v.
SCALES and others.**

The venue in an action on a policy of insurance, changed from the county of a city to the adjoining county, upon an affidavit stating that an impartial trial could not be had in the former.

Slight grounds are sufficient to change the venue from the county of a city to the adjoining county.

MR. J. BLAKE, Q. C., for the defendants, moved that the venue laid in the declaration be changed from the county of the city of Cork to the county of Cork.

The motion was grounded on the affidavit of the defendants' attorney, which stated that the action was brought in the name of Scanlan and wife against the defendants, who were three of the Directors of the Caledonian Insurance Company, for the purpose of recovering a sum of £1500, alleged to be due on foot of a policy of insurance effected by the said E. Fitzmaurice in his lifetime. That the policy of insurance (which was a life policy) had been entered into at the instance of a Mr. S.M'Carthy, of the city of Cork, to whom it was subsequently assigned by Fitzmaurice. That the deponent and his partner, who were employed to defend the action, had ascertained, in the course of their inquiries, that the said S. M'Carthy had spread through the city of Cork, where the venue was laid, reports concerning the subject-matter in issue highly prejudicial and injurious to the defendants. The deponent stated his belief, grounded on the reasons detailed in the affidavit, that an impartial trial could not be had in the city of Cork.

The defendants pleaded on the 29th instant, on which day notice of this motion was served.

Mr. Barry, for the plaintiffs, *contra*.

PENNEFATHER, B.

This case may very well be tried in the county of Cork. Slight grounds are sufficient to induce the Court to change the venue from a county of a city to the adjoining county.* In transitory actions, the Court had the power to do it before the statute, and independently of it†; and although not quite a motion of course, it is next to it. Actions on policies of insurance, it is well known, are frequently tried in cities under very considerable disadvantages.

The other Members of the Court concurred.

COURT.—Let the venue in the declaration in this cause be changed from the county of the city of Cork to the county of Cork, without further motion.‡

* See *Smyth v. Jordon*, Cr. & Dix, A. N. C. 106.

† 6 G. 4, c. 51, s. 2. See the preceding case.

‡ Upon the subject of changing or retaining the venue, on the ground that a fair and impartial trial cannot be had in the place in

Tuesday, February 18th.

IN CHAMBER.

Coram the LORD CHIEF BARON and the rest of the BARONS.

ASSIGNMENT OF JUDGMENT—MEMORIAL—APPOINTMENT OF NEW TRUSTEE—1 W. 4, c. 60—PRACTICE.

BURROWES v. HOGAN.

MR. RICHARD ANNESLEY BILLING applied in Chamber, that the assignment of the judgment obtained in Trinity Term 1824, by Peter Burrowes against John Hogan, might, on being assigned by Henry Hovenden, pursuant to the order of the High Court of Chancery of the 7th of February 1840, to Theobald Billing, be entered and enrolled as of record in this Court, and that the proper Officer should be directed to enter and enrol such assignment.*

The following were the facts of the case:—On the intermarriage of the Rev. A. B. Campbell, with Caroline Campbell, otherwise Hogan, a bond was executed by J. Hogan, the father of Caroline, to Peter Burrowes, Esq., as a trustee for the purposes of the marriage. Judgment was subsequently entered on said bond at the suit of Mr. Burrowes, the trustee. The money due on the judgment was now about to be paid off, but Mr. Burrowes refused to satisfy the judgment, alleging as a reason his disinclination, in consequence of his advanced age, to interfere in any business. A petition was accordingly presented in the Court of Chancery, under the statute 1 W. 4, c. 60, praying that it might be referred to one of the Masters to approve of a fit and proper person to be appointed a trustee in the place of the said P. Burrowes.† An order of reference was thereupon made to Wm. Henn, Esq., one of the Masters, by whom a report was made, approving

Where a judgment has been assigned to new trustees by a person appointed for that purpose pursuant to an order of the Court of Chancery, made upon petition under the 1 W. 4, c. 60, the Court of Exchequer will on motion direct the proper Officer to enter and enrol the assignment thereof.

* See the 9 G. 2, c. 5, s. 1, *Ir.*

† See 1 W. 4, c. 60, s. 22.

which the venue is originally laid, or to which it is sought to be removed, see the following cases: *Kelly v. Cavendish*, 3 Law Rec. 2d Ser. 67; *Lessee Keon v. Keon*, id. 137; *Lessee Dowdall v. Dowdall*, 1 Law Rec. 1st Ser. 355; *Lessee Jackson v. Lodge*, 1 Ir. Law Rep. 161; *Anon.*, 4 Law Rec. 2 Ser. 62;

Vaughan v. Byrne, Hayes, 123; *Seed v. Harvey*, Crawford & Dix, A. N. C. 117; *O'Shaughnessy v. Lambert*, 1 Ir. Law Rep. 104; S. C. 1 Jebb. & S. 421; *Reynolds v. Power*, 1 Smythe, 139; *Macdonough v. D'Arcy*, id. 195; *Stewart v. Lynar*, 1 Ir. Law Rep. 199; *Re v. Hunt*, 3 B. & Al. 444.

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 BURROWES
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of T. Billing, Esq., as a fit and proper person to be appointed trustee in the place of Mr. Burrowes. It was further found by the report, that Burrowes, although duly called on for that purpose, had refused to assign the said judgment; and the Master thereby approved of R. Hovenden as a fit and proper person to be appointed, instead of Burrowes, to assign the judgment.*

The present application became necessary, as the Officer of the Court of Exchequer declined to enter and enrol the assignment of the judgment, without the directions of the Court.

Mr. *Billing* was heard in support of the application, and contended, that where a judgment formed the subject of a trust, the case came within the provisions of the 1 *W.* 4, c. 60. The word "judgment" was not expressly mentioned in the act of parliament, but the term "land," by the interpreting clause, had received a signification sufficiently comprehensive to include the case of a judgment. That such was the opinion of the Master of the Rolls, was manifest from his having granted the prayer of this petition, in which the facts were fully stated. In *Johnston v. Anketell (a)*, the subject-matter of the trust was likewise a judgment.

Their Lordships having conferred together, made the following order:—

Upon motion, &c., and on reading the order of the 7th of February instant, made in the said matter in the words and figures following:—"Lord Chancellor.—The 7th day of February, 1840.—In the matter of the Rev. A. B. Campbell, Clerk, and Caroline his wife, petitioners; Peter Burrowes, Esq., respondent.—Whereas the Rev. A. B. Campbell, Clerk, and Caroline his wife, did, on the 6th day of February 1840, prefer their petition to the Right Honorable the Lord High Chancellor of Ireland, setting forth as therein is stated, and praying that the report bearing date the 9th day of January 1840 might stand confirmed; and accordingly, that Theobald Billing, of the city of Dublin, Esquire, might be appointed a trustee in the place and stead of the said Peter Burrowes, and that Henry Hovenden might be appointed in the place of the said Peter Burrowes, to assign the judgment or trust securities in the petition mentioned: Whereupon and on reading the said petition, the order bearing date the 9th day of November 1839, as also the report of William Henn, Esq.,

* See sections 8 & 9 of the 1 *W.* 4, c. 60.

(a) 5 Law Rec. 2d Ser. 201.

"bearing date the 29th day of January 1840, his Lordship
"doth order that the said report do stand confirmed; and
"accordingly, it is further ordered, that Theobald Billing,
"of the city of Dublin, Esquire, be, and is hereby appointed a
"trustee in the place and stead of Peter Burrowes, the res-
"pondent in this matter; and it is further ordered, that Henry
"Hovenden be, and is hereby appointed in the place of the
"said Peter Burrowes, to assign; and it is hereby further
"ordered, that he do assign the said trust funds and premises
"so as to vest the same in the said Theobald Billing, as such
"new trustee, upon the same trust as the said Peter Burrowes
"is now possessed of the same; and it is further ordered, that it
"be referred to W. Henn, Esq., one of the Masters of this Court,
"to settle a proper deed for that purpose, in case the parties
"differ about the same."—And whereas, pursuant to the said
order above recited, a deed of assignment has been executed by
the said Henry Hovenden to the said Theobald Billing of the
judgment, trust funds, and premises in the said order men-
tioned, upon the same trusts as the said Peter Burrowes was
possessed of the same, so as to vest the same in the said Theo-
bald Billing, as such new trustee—WHEREUPON and on read-
ing said order; the said deed of assignment of the judgment
obtained by plaintiff against defendant in this cause in Trinity
Term 1824, for the sum of £2000, late currency, debt, besides
costs, and on affidavit; IT IS ORDERED by the Lord Chief
Baron and the rest of the Barons, that the Officer do enter the
assignment of the said judgment on the roll thereof; and in the
entry of the said assignment, to recite so much of the forego-
ing order of the High Court of Chancery as has been set out in
the memorial of the said assignment, without further motion.

1840.

BURROWES
v.
HOGAN.

EASTER TERM, 1840.

Wednesday, April 15th.

ASSIGNMENT OF JUDGMENT—MEMORIAL—APPOINTMENT OF NEW TRUSTEE—1 W. 4, c. 60—PRACTICE.

JOHN LEES ARMIT, Assignee of JOHN ARMIT and Sir RICHARD BOROUGH, Bart., deceased, v. the Right Honorable THOMAS HENRY FORSTER, now Lord Viscount FERRARD.

Same v. the Right Honorable THOMAS HENRY SKEFFINGTON, now Lord Viscount FERRARD.


Where new trustees had been appointed by an order of the Court of Chancery, made upon petition under the 1 W. 4, c. 60, and a person appointed to assign the trust securities (consisting of judgments) so as to vest the same in such new trustees upon the trusts in the petition mentioned—the Court of Exchequer, on motion, directed its Officer to enter the assignment of the said judgments on the roll thereof, and in the entry of such assignment to recite so much of the order of the Court of Chancery as had been set out in the memorial of the assignment.

Mr. CONNOR, on behalf of William Edrington Beresford Worthington, and Benjamin Ball, surviving trustees named in and appointed by the last will and testament of John Armit, deceased, moved that the order of the Court of Chancery, dated the 24th January 1840, be received and made the rule or order of this Court.

In support of the motion, an affidavit was made by Edward Robert Ball, which stated, that in or as of Trinity Term 1815, the said John Armit and Sir Richard Borough obtained a judgment in this Court against the Honorable Thomas Henry Forster, in the penal sum of £8000; and that the same parties, in or as of Trinity Term 1817, obtained another judgment in this Court against the said T. H. Forster, by his then name of T. H. Skeffington, in the penal sum of £2000. That these judgments afterwards, by deed of assignment dated the 7th November 1821, duly enrolled, vested in John Lees Armit, Esq. That by a report of one of the Masters of the Court of Chancery in Ireland, made in a certain matter, wherein the present applicants were petitioners, the said Master found that the said John L. Armit is now trustee within the meaning of the act of parliament of the 1 W. 4, c. 60, and that he was possessed of said two judgments respectively, as a trustee, for the sole use and benefit of the executors of the said John Armit; and by the said report the Master approved of the said W. E. B. Worthington and Benjamin Ball as such surviving trustees and executors, as fit and proper persons to be appointed trustees in the place of the said John L. Armit; and by the said report, the Master also approved of deponent as a fit and proper person to be appointed in the place of the said John L. Armit, to assign said trust securities, so as to vest the same in the said W. E. B. Worthington and B. Ball. That by an order made in the said matter, dated the 24th January 1840, it was amongst other things ordered, that the said report should stand confirmed, &c. It was further stated, that the present affidavit was made for the purpose of making that order a rule of the Court of Exchequer, which the deponent was informed it was necessary to do.

PENNEFATHER B.*

The object of the present motion cannot be attained in that way; but an order may be framed in accordance with one which we had recently occasion to consider.†

1840.

 ARMIT
 v.
 LORD
 RERRARD.

The order made in the present case was in the following form:—

Upon motion, &c., and on reading the petition of the said William Edrington Beresford Worthington and Benjamin Ball, and the order of the 24th January 1840, made by the High Court of Chancery in the matter of said petition, in the words and figures following:—“ Lord Chancellor.—The 24th day of January 1840.—In the matter of the petition of W. E. B. Worthington and Benjamin Ball, surviving trustees named in and appointed by the last will and testament of John Armit, deceased; and in the matter of the act of parliament 1 W. 4, c. 60.—Whereas the said W. E. B. Worthington and Benjamin Ball did, on the 23d day of January 1840, prefer their petition to the Right Honorable the Lord High Chancellor of Ireland, setting forth as therein is stated, and praying that the report might stand confirmed; and accordingly, that the petitioners W. E. B. Worthington and Benjamin Ball might be appointed trustees in the place of John Lees Armit in the petition named, for the purposes in the petition mentioned, and that Edmund Robert Ball might be appointed in the place of the said John Lees Armit to assign the trust securities, so as to vest the same in the petitioners, upon the trusts of the will of John Armit, deceased; and if necessary, that it might be referred to the Master to settle a proper deed for that purpose:—Whereupon and on reading the said petition, the order bearing date the 11th day of December 1839, as also the report of Roderick Connor, Esq., bearing date the 9th day of January 1840, his Lordship doth order that the said report do stand confirmed; and accordingly, it is further ordered that the petitioners W. E. B. Worthington and Benjamin Ball be and are hereby appointed trustees in the place of the said John Lees Armit, for the purposes aforesaid; and it is further ordered, that the said Edmund Robert Ball be and is hereby appointed in the place of the said John Lees Armit to assign said trust securities so as to vest the same in the said W. E. B. Worthington and Benjamin Ball, upon the trusts of the said will of the said John Armit, deceased,

* The LORD CHIEF BARON was absent, from indisposition, during the whole of this Term.

† See the preceding case.

1840.

ARMIT
v.
LORD
FERRARD.

"or of such of them as are now subsisting and capable of taking effect; and it is further ordered, that it be referred to Rodrick Connor, Esq., one of the Masters of this Court, to settle and approve of a proper deed for that purpose, in case the parties differ about the same." And whereas, pursuant to the said order above recited, a deed of assignment has been executed by the said Edmund Robert Ball to the said W. E. B. Worthington and Benjamin Ball of the trust securities, so as to vest the same in the said W. E. B. Worthington and Benjamin Ball, upon the trusts in the will of the said John Armit. WHEREUPON and on reading said order, the deed of assignment of the two judgments in these causes, (one of said judgments obtained in Trinity Term 1815, for the sum of £8000 sterling, debt, besides costs; and the other of said judgments obtained in Trinity Term 1817, for the sum of £2000 sterling, debt, besides costs), and an affidavit: IT IS ORDERED by the Court, that the Officer do enter the assignment of the said judgments on the roll thereof; and in the entry of the said assignment, to recite so much of the order of the High Court of Chancery as has been set out in the memorial of said assignment, without further motion.*

* The orders in this and the length, from the special nature and preceding case have been given at novelty of their forms.

Thursday, April 30th.

ARREST—ATTACHMENT—LORD MAYOR AND SHERIFFS COURT—JURISDICTION.

DANIEL v. DANIEL.

The defendant having been arrested on a marked writ, issued out of this Court, was discharged on entering a common appearance, upon the ground that his goods had been seized under an attachment from the Lord Mayor and Sheriffs' Court for the same cause of action, and that the proceedings in that Court were pending at the time of the arrest.

MR. MACDONAGH applied to the Court that the defendant be discharged out of custody of the sheriffs of the county of the city of Dublin under the writ in this cause, on his entering a common appearance, and for the costs of such application, inasmuch as the plaintiff issued an attachment forth of the Lord Mayor and Sheriffs' Court of the City of Dublin, and seized the defendant's goods thereunder, and had same in custody under said attachment at the time of the issuing the writ in this cause,

and of the arrest of defendant, which said writ was issued for one and the same cause of action as that for which said attachment was issued, and said goods were so in custody; and inasmuch as the proceedings in the said Court of the Lord Mayor and Sheriffs were pending and undetermined at the time the writ in this cause was issued, and of the arrest of the defendant under it.

It appeared by the affidavits that the plaintiff on the 27th of March last, having made an affidavit of debt, issued an attachment from the Lord Mayor and Sheriffs' Court, under which the defendant's goods were seized and removed to the stores of the Marshal of the City of Dublin. The affidavit of debt having been defective, the defendant on the 13th of April obtained a conditional order from the Recorder, that the goods seized under the attachment should be discharged, on defendant's entering a common appearance. On the 20th of April the plaintiff by her counsel endeavoured to sustain the affidavit, but it not being sustainable, the conditional order was made absolute on the terms of the defendant's entering a common appearance, which was accordingly done. It was sworn, that on the same day, and immediately after the order was made absolute, before the defendant's goods could be released out of the custody of the Officer, and whilst the defendant was attending the Court to obtain the order for the discharge of his goods, he was arrested at the plaintiff's suit, under a marked writ issued out of this Court, for the same cause of action. It appeared that the plaintiff had caused a rule to discontinue to be entered, which rule, however, was not served on the defendant's attorney, nor was any offer made to pay the costs.

Mr. *Macdonagh* contended that this case came within the principle *nemo debet bis vexari pro eadem causa*, and relied upon *Naylor v. Bagar* (a); *Raynes v. Wyre* (b); *Gunn v. M'Clintock* (c). He distinguishes the cases of *Bromley v. Peck* (d), and *Wood v. Thompson* (e), from the present, inasmuch as in those cases the goods were not removed from the possession of the defendant.—[PENNEFATHER, B. Would he be obliged to give bail then?—Yes, he would not be allowed to appear until he gave bail for the debt and costs. The foreign attachment was intended to apply to the case of foreign merchants, who after incurring debts here, and having goods of a large value in the possession of third persons, might withdraw from the country. It was allowed to attach his goods in the hands of such holders of them, and they were not discharged from the attachment until he gave security for the debt and costs; and even if the foreign attachment and city attachment should be considered identi-

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(a) 2 Young & Jer. 90.

(b) 2 Mer. 472.

(c) 2 Cr. & Mes. 668.

(d) 1 Marsh. 397 n.; 5 Taunt. 852, n.

(e) 1 Marsh. 395, n.; 5 Taunt. 851,

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DANIEL.

cal in their effect, yet the reasoning in *Naylor v. Bagar* applies precisely to this case—it is impossible to draw any distinction between them. It was at one time thought that the two Courts should be of co-ordinate jurisdiction, but that notion is now exploded; *Raynes v. Wyre* (a). He also referred to *Imley v. Ellisfen* (b); *England v. Lewis* (c); *Imley v. Ellisfen* (d); *Olmus v. Delany* (e); and *Thompson v. O'Reilly*, decided by Baron PENNEFATHER in Michaelmas Term 1839.

Mr. Hatchell, Q. C., and Mr. O'Hea, for the plaintiff.

There are two simple principles on which applications of this nature are founded, and within one or other of which the defendant here must bring his case. The first is, that whether the process be bailable or non-bailable, a man ought not to be harrassed by two actions for the same cause, therefore; where an action is brought it should be regularly discontinued before the plaintiff can commence a second action for the same cause, by entering a rule to discontinue on payment of costs of the first action, or else the defendant will be allowed to plead the pendency of the first action in abatement; or if he be arrested on the second action, the Court will relieve him from the arrest; and this, whether the first action was commenced by bailable or non-bailable process. But the second action must be brought in Courts of co-ordinate jurisdiction, for the pendency of an action for the same cause in an inferior Court is no bar to an action in a superior one; *Bae. Ab. Abatement* (M.); *Com. Dig. Abatement* (H.), 24; *Sperry's Case* (f).

The second principle is, that a man must not be twice arrested for the same cause of action. The cases on this principle are collected 1 *Tidd*. 177, 9th ed. On the part of the defendant it must be contended that an attachment of the goods of a party in an inferior Court is tantamount to an arrest of the person.—[FOSTER, B. How do you distinguish this case from the case of *Naylor v. Bagar* (g)?]—That was an attachment under a statutable jurisdiction vested in the Court, enabling it to distrain the goods as a security for the debt and costs; as in Ireland the statute regulating the corporation of Waterford requires a person whose goods are attached in the Mayor's Court there to give bail as in error to pay the debt and costs, and thereby gives a creditor the most perfect security; but the bail put in in the Lord Mayor's Court here is only for the appearance of the defendant; in the case of *Naylor v. Bagar* the plaintiff must have had perfect security for his debt from the goods attached abroad. But here the moment the appearance was entered, the Re-

(a) 2 Mer. 472.

(b) 2 East, 456.

(c) 3 Dow. & Ry. 189.

(d) 3 East, 311.

(e) 2 Strange, 1216.

(f) 5 Coke, 62.

(g) 2 Young & Jer. 90.

corder made an order discharging the goods, and from that moment they ceased to be in the custody of the law, or to afford any security to the plaintiff. It is positively sworn that it is not the practice of the inferior Court to serve the rule to discontinue, but merely to enter it, in the same manner as the rule moving on an ejectment in this Court; and as to paying the defendant costs to perfect the discontinuance, there were no costs incurred; the costs of taking the goods were the costs of the plaintiff and paid by him; therefore, it was unnecessary to pay defendant any to complete the discontinuance. There is virtually no difference between a foreign attachment and a city attachment. In the former the goods of the defendant are attached in the hands of a third person, and they are detained in the hands of the garnishee until the defendant give bail; in the latter, they are seized in his own hands and taken into the custody of the Marshal until the same time. The proceeding by attachment is at most no more than serviceable process, and after such, a party may sue out a bailable writ, and arrest the defendant for the same cause of action without entering a discontinuance; *Davinson v. Cleworth* (a); *Bishop v. Powell* (b). So that even if the discontinuance was not complete, which we contend it was, or if the goods were attached or distrained by the process of a superior Court, much more an inferior, the plaintiff is not thereby prevented arresting him for the same cause of action. They also cited *Bromley v. Peck* (c); *Wood v. Thompson* (d); *Paine v. Gaudery* (e).

Mr. Macdonagh, in reply, was directed by the Court to apply himself to the question of discontinuance.

Even if the rule to discontinue need not be served, the discontinuance is not complete until the costs have been paid. It is said the defendant could have incurred no costs here, that is a question the Court will not now enter upon; but, at all events, by the practice of the inferior Court, we could not obtain an order discharging the goods from the attachment until we had entered an appearance: upon the production of the certificate of appearance entered, the goods are discharged. The defendant was obliged to incur the costs of entering that appearance, which have not been paid.

PENNEFATHER, B.*

This is an application which is made under peculiar circumstances,—it partakes of the nature of an application to discharge a person after a first arrest for the same cause of action, yet it is not altogether that,

(a) 1 Chit. 275.

(b) 6 T. R. 616.

(c) 1 Marsh. 397, n.; 5 Taunt. 852, n. (d) 1 Marsh. 395; 5 Taunt. 851.

(e) 3 D. & R. 33.

* *Vide ante*, p. 373, note.

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nor is it altogether as if an arrest was made after serviceable process ; but it is a mixed case not to be governed either by the principle applicable to a second arrest, or to an arrest after serviceable process.

A proceeding is instituted in the Lord Mayor's Court, and the goods of the defendant are seized to the amount of the debt ; these goods are not discharged until bail is put in, which is the same as that put in upon a marked writ, viz., to pay the debt or surrender the body of the defendant ; their effect is substantially the same ; then, I think if bail had been put in in the Lord Mayor's Court, or the goods had remained in the custody of the Marshal, the case in *Young and Jervis* would exactly apply to the present. That case quite establishes the principle that where a person has by his proceedings in another Court obtained security for his demand, he shall not afterwards arrest the defendant for the same cause. The cases cited from 2 *Mer.* 472, and 2 *East.* 456, shew that there is no difference where the goods are attached and the security obtained by the process of a Court of inferior jurisdiction. Suppose, then, this were a case in which the party had the goods taken and bail put in, I do not think he would be then justified in arresting the defendant for the same cause.

This is very different from an arrest after serviceable process. What then is the nature and state of the proceedings in the Lord Mayor's Court ? I think they are not sufficiently determined to warrant an arrest. It is not necessary to consider whether there is any difference between city and foreign attachments, although I think there is a distinction, and one of no small consequence ; here the goods are taken out of the hands of the owner into the custody of the Marshal ; in foreign attachments the goods are not removed from the hands of the person holding them. Nor are we driven to examine what would be the effect of an arrest after a perfect discontinuance of the proceedings in the Lord Mayor's Court. The defendant obtained the order discharging the attachment upon the terms of entering an appearance ; he was entitled to the restoration of his property on those terms ; the appearance formed a condition precedent ; which he was obliged to perform ; he was thus bound to enter that appearance ; certain costs must therefore have been incurred, and until those costs were paid by the plaintiff, or service of a summons to tax those costs upon the defendant's attorney, the action was not discontinued.* It is no answer that the goods were discharged in consequence of a defective affidavit. The cases cited by Mr. *Macdonagh* were also cases of defective affidavits ; but our judgment is grounded on this circumstance—the pendency of former proceedings, under which all the benefit of an arrest was obtained or might have been obtained, and until the determination of which proceedings, the plaintiff was not entitled to come into this Court.

* See acc. *Molling v. Buckholtz*, 3 M. & S. 153.

I think the fact of the inferior Court having common law or statutory jurisdiction, can make no difference. It would be a great hardship that a party should have his goods taken, and be himself arrested for the same cause. We give no opinion, of course, in this case, as to what would be the effect of a full discontinuance.

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DANIEL.

COURT.—Let the defendant be discharged on entering a common appearance.—No costs.

Wednesday, May 13th.

PRACTICE—HUSBAND AND WIFE—APPEARANCE—
PROCESS.

POE v. JONES and Wife.

MR. EDWARD PENNEFATHER, jun., moved to set aside the appearance entered in this cause on the 9th instant, for the defendant Anne Jones separately. The defendants were personally served on the 4th of May with a common law subpoena, in which they were described as "Hugo Jones and Anne his wife, which said Anne Jones is sole executrix of "Ellen Butler, deceased." An appearance was due on the 8th, and none having been entered, the plaintiff proceeded on the next day to the office, for the purpose of issuing an attachment, but was prevented from doing so by a separate appearance having been on that day previously filed, for the defendant Anne. Notice of the appearance had not been served, and the object of it was obviously to delay and embarrass the plaintiff.

Where the process was against husband and wife, a separate appearance entered for the latter, was set aside with costs, to be paid by the attorney who entered it.

Per Curiam.

It was quite irregular to enter a separate appearance for the female defendant, which could only be done upon a special application to the Court.

Set aside the appearance, with costs, to be paid by the attorney who entered it.*

* A *feme covert* cannot appoint an attorney, *Oulds v. Sanson*, 3 Taunt. 261; therefore, if she be sued alone, she must appear in person; *Co. Lit.* 135. But if the husband and wife be sued jointly, they may appear by attorney; for the husband is capable of appointing an attorney for both; *Foxvise v. Tremaine*, 2 Saund. 213.

Friday, May 1st.

PRACTICE—FORM OF ORDER FOR SPECIAL JURY.

WOODS v. SANDFORD.

Form of rule
for special jury
when obtained
by defendant
after notice of
trial served.

THIS being an equity day, Mr. *Andrews* moved on behalf of the plaintiff, before Baron PENNEFATHER in Chamber, that the order for a special jury, obtained by the defendant in this cause on the 27th of April, should be discharged, on the grounds of its being a peremptory order that the case should be tried by a special jury; so that, according to its terms, the learned Baron, who was then sitting at *Nisi Prius*,* would not be at liberty to try the cause by a common jury.

It appeared by the affidavit, relied on by the plaintiff, that the notice of trial was served on the 18th of April for the 1st of May; that on the 21st of April the *distringas* was lodged with the Sheriff; that the cause at the time of this application was in the *Nisi Prius* list for trial, and the witnesses in attendance. The order of the 27th of April directed, "that the issue in this cause should be tried by a special jury, and that for that purpose the Sheriff should attend the Clerk of the Pleas with the book containing the names and residences of the special jurors," &c. That order was served on the 28th of April, together with a summons to attend the striking of the special jury on the 2nd of May.

It was sworn upon belief, that the order for the special jury was obtained for the purpose of delay, and that there was no reason for trying the cause by a special jury.

Mr. *Macdonagh*, for the defendant, contended that the order for a special jury was the usual and regular order of the Court in such cases; and that a defendant cannot apply for a special jury until after notice of trial served as he does not know until then whether or not the plaintiff will ever try the cause.

Mr. *Andrews*, in reply, cited *Gubba v. M'Kenna* (a).

PENNEFATHER, B.—The order for the special jury in this case must be varied. A defendant has no right to use the rules of the Court to delay the plaintiff improperly; and it is pretty obvious that has been the defendant's object here. Therefore, let the order of the 27th of April be amended, by striking out the peremptory direction; and substitute the words, "Let the special jury be struck in this cause, without prejudice to the notice of trial."

(a) 1 Jebb. & Symer, 62.

* Baron FOSTER.

His Lordship then directed the Officer to let the rule for a special jury, when obtained, be in that form for the future; but as the rule should not operate retrospectively, he gave no costs of the motion.*

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WOODS
v.

SANDEFORD.

* Present forms of special jury rules for plaintiff and defendant. Special jury rule on behalf of plaintiff.

"A. B." "Upon motion of Mr. v. —, plaintiff's counsel, It is Ordered by —, the Court, that *the issue in this cause* be tried by a special jury, and for that purpose, that the Sheriff of the county of —, or his Sub-sheriff, do attend the Clerk of the Pleas of this Court, with the book containing the names and additions of the special jurors of the said county, and with the separate parchments or cards containing the numbers and reference to said book, in order that he may ballot for a jury to try *the said issue* pursuant to the statute."

Special jury rule on behalf of defendant.

"A. B." "On motion of Mr. v. —, defendant's counsel, It is ordered by the Court, that a special jury *be struck in this cause*, without prejudice to the notice of trial, and for that purpose that the Sheriff of the county of —, or his Sub-sheriff, do attend the Clerk of the Pleas of this Court, with the book containing the names and additions of the special jurors of the said county, and with the separate parchments or cards containing the numbers and reference to said book, in order that he may ballot for a jury to try *the issue in this cause*, pursuant to the statute."

Monday, May 11th.

PRACTICE—PARTICULARS OF SET-OFF.

DARLEY v. Executors of MURPHY, Attorney.

MR. O'HARA, for plaintiffs, moved that the defendants be precluded from giving evidence of any set-off on the trial of the issue in this cause, they not having complied with the order of the 31st of January last.

On the 31st of January, a side-bar rule was obtained, that the defendants should furnish the plaintiff with a bill of the particulars of the set-off mentioned in defendant's notice, in two days after service of the rule, or in default thereof, that they should be precluded from giving the same in evidence on the trial of the issue in this cause.

A bill of particulars had been served, but it was too general and vague, merely repeating the notice of set-off. It must be considered as if the executors themselves were the parties suing.

In this Court, an affidavit is required to ground a motion for further particulars of the defendant's set-off.

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DARLEY
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MURPHY.

PENNEFATHER, B.—Yes; and if that were the case the defendant could not, by the settled practice of this Court, obtain further particulars of plaintiff's demand, without an affidavit stating that the particulars furnished were not sufficient to enable him to conduct his defence.* So here, an affidavit should have been made, stating the necessity for such further particulars to enable the plaintiff to meet the defendants' set-off.

Mr. Peobles, for the defendant.—The plaintiff has not made any affidavit to ground the motion, but has made one in reply to the defendant's affidavit, which shews that the testator furnished the bill of costs, the subject of the set-off, and it is not denied that the bills of costs referred to by the bill of particulars are in the hands of plaintiff.

Motion refused, with costs.†

* See *Russell v. Allen*, 3 Law Rec. 2d Ser. 276; *Blake v. Broadhurst*, *id.* 278.

† To obtain particulars of the defendant's set-off, the Queen's Bench alone requires a motion before the Court in Term, or a Judge in Vacation, and an affidavit stating the necessity for such particulars; but no notice of this motion need be given.—*Fottrell v. Maguire*, 1 Jebb & S. 26, and note, *ib.*; *Wilson v. Ramsay*, 1 Ir. Law Rep. 37; and see the note to the latter case, where the proper form of affidavit in such cases is given. See, also, 1 *Stewart's Forms*, p. 485, 3d ed. In the Common Pleas, and in this Court, the rule for the particulars of the defendant's set-off is granted as of course in the office, without any affidavit, on production of the attested copy of the plea or notice of set-off.

The following is the form of the side-bar rule entered in this Court:—

“A. B. } “Upon motion of Mr.
v. } “_____, plaintiff's at-
“C. D. } “torney, and on reading
“_____” “the pleadings, It is or-
“dered by the Court, that the de-
“fendant do furnish the plaintiff
“with a bill of the particulars of
“the set-off mentioned in defend-
“ant's (PLEA or NOTICE, as the
“case may be,) in two days after
“service of this rule, or in default
“thereof, that he be precluded
“from giving the same in evidence
“on the trial of the issue in this
“cause.”

Where it is sought to obtain further particulars of the defendant's set-off, the application must be by motion to the Court on notice, grounded on an affidavit stating the necessity for such further particulars, and shewing in what respect the former particulars are defective.

Wednesday, May 13th.

PRACTICE—NOTICE OF SET-OFF—PLEA OF SET-OFF—
AMENDING PLEAS.

DARLEY v. Executors of MURPHY, Attorney.

MR. PEEBLES moved that the defendants be at liberty to amend their pleas in this cause, already pleaded, by adding thereto a plea of set-off, and amending plaintiff's copy of said pleas.

The defendants had pleaded the general issue and statute of limitations, with which notice of set-off had been given.

Counsel stated the conflicting decisions in England, of Lord Ellenborough, in *Coulson v. Jones* (a), and of Lord Tenterden, in *Webber v. Venn* (b), and referred to the late decision in *Duncan v. Grant* (c), concurring with the opinion of Lord Tenterden, that a notice of set-off is allowed by the statute where the general issue alone is pleaded, and not where there is a special plea.*

PENNEFATHER, B.

In this country, it has not been the practice to require a set-off to be pleaded in such a case; but there is no objection to the motion, if you think it the safer course to plead.

Mr. O'Hara, for plaintiffs, asked for costs.

Mr. Peebles.—The defendants furnished a consent, and offered the terms of amending plaintiff's copy of the pleas; and no replication has yet been filed.

COURT.—Let the motion be granted as desired, defendants pleading such plea within two days, and withdrawing their notice of set-off.—No costs of this motion.

(a) 6 Esp. 50.

(b) R & M. 413.

(c) 1 Cramp. Mes. & Res. 383.

* See *Montague on Set-off*, p. 42, 2d ed.

Where the defendants had pleaded the general issue and statute of limitations, with which notice of set-off had been given, they were permitted to amend their pleas, by adding thereto a plea of set-off, upon the terms of amending plaintiff's copy of the pleas, and withdrawing their notice of set-off.

NOTE.—Several cases decided in this and the preceding Term have been unavoidably omitted in consequence of the space allotted to the Exchequer Reports having been limited by the arrangements made for bringing the present volume to a close.

TRINITY TERM, 1840.

Monday, June 1st.

COVENANT FOR RENT—ADMINISTRATOR—PLEADING—
PRACTICE—WITHDRAWING ISSUES FROM JURY.

Assignee of GREEN v. Earl of LINTOWEL.*

Covenant for rent arrear against the administrator of a lessee for years. The declaration stated that "all the estate, &c., term of years to come and unexpired, property, profit, &c. in said premises, by assignment thereof, came to and vested in the defendant, who thereupon then and there entered into and upon all and singular the said premises, and was thereof possessed from thence hitherto."

The defendant pleaded nine

pleas:—1st, *non est factum*; 2ndly, that the estate, &c., did not vest in him *modo et forma*. Upon the latter plea issue was joined, and the questions in the case turned entirely upon this issue. To support it, the plaintiff gave in evidence the lease and the letters of administration of the goods, &c. of the lessee granted to the defendant, and rested his case upon these. The learned Judge directed the jury to find for the defendant, unless they believed he was assignee in any other way than as administrator. They found for the defendant. To this direction an exception was taken by the plaintiff: *Held*, that proof of the letters of administration, without proof of entry by the administrator, sustained the above issue. RICHARDS, B., *dissentiente*, his Lordship being of opinion that the personal representative being sued as assignee generally, the *onus* lay upon the plaintiff to shew that he was such assignee, not alone by proof of the letters of administration, but also by entry or the like, and that in such case the plea that he is not assignee *modo et forma* put every thing in issue.

In this case, issue having been joined upon the first eight pleas, and the jury having given a verdict for the plaintiff upon the first issue, and for the defendant on the second:—*Held*, that the learned Judge was authorised in withdrawing the remaining six issues from the jury, it being a matter for the exercise of his discretion.

COVENANT for rent arrear. This case was tried before Serjeant Moore at the Cork Summer Assizes, 1838. It now came before the Court on a bill of exceptions to the charge of the learned Judge. The declaration contained one count on a lease dated 1st October 1811, made by T. T. Green to the Hon. Richard Hare, for 100 years, provided the lessor should so long live, of part of the lands of Conway. The lease contained the usual covenants for lessee, his administrators, &c. The declaration contained the following averment:—That on the 1st October 1827, "all the estate, right, title, interest, term for years then to come and unexpired, property, profit, claim and demand whatsoever, of and in the said demised premises, with the appurtenances, by assignment thereof, then and there legally made, came to and vested in the said defendant, who thereupon then and there entered into and upon all and singular the said demised premises, and was thereof possessed from thence hitherto." Breach, September 29th 1837, £1512 due for ten and a-half years' rent.

There were nine pleas—first, *non est factum*, found for plaintiff; second, *actio non*, because, &c., that all the estate, &c., did not come to and vest in the said defendant in manner and form, &c.; and issue thereupon joined. The jury having been discharged from finding on the six following pleas, and a demurrer having been taken to the ninth,

* Upon the 13th of June the Court desired that this case should be re-argued by one counsel on each side; when Mr. Bennett, Q. C., was heard for the defendant, and Mr. O'Leary for the plaintiff. All the authorities referred to are given in the report.

namely, a plea of the statute of limitations, to all but six years, the question turned solely on the issue joined on the second plea. To sustain that issue, the plaintiff gave in evidence the following proofs:—

1st.—Letters of administration of goods, &c., of the Hon. Richard Hare (then Lord Viscount Ennismore), granted to defendant.

2d.—Charles Furlong, land agent of intestate.—Intestate held lands until his death, in September 1827; some cattle remained on the lands until January 16th, 1828, when he paid rent up to March 1828 and left the lands by the directions of the defendant's land agent, and a third person has been in possession ever since.

3d.—William Beckley.—Rased trees on Conway for defendant in spring, after intestate's death; they were moved to defendant's demesne and sold by auction; saw defendant's cattle on Conway.

4th.—William Shinnick.—Recollects Lord Ennismore's death; after it, saw trees rased on Conway by defendant's workmen; believes in January 1828; saw defendant's cattle on Conway at Christmas 1827.

Plaintiff then closed his case, and the defendant offered no evidence.

The learned Judge gave the following direction:—"I left it to the Jury to say whether the defendant was assignee in any other way than as administrator; and if they were of opinion that he was not, I directed them, on the facts proved, to find for the plaintiff on the first plea, and defendant on the second; and they having so done, I discharged them of the other issues. Mr. Henn, Q.C., for plaintiff, contended that I should have directed the jury, on the second issue, to find for plaintiff, inasmuch as by a grant of administration, defendant was legal assignee, and as such liable to the payment of the rent; and I refused so to direct them."

The bill contained also an exception on the ground of the other issues not having been left to the jury.

Mr. C. F. P. O'Leary, with whom were Messrs. Henn, Q.C., and Collins, Q.C., contended for four propositions: first, on the pleadings as framed, the issue knit on the second plea is conclusively sustained. *Sir Wm. Moore's Case* (a) is precisely in point—the question in that case must have arisen on a traverse framed precisely as the present one, or on a demurrer, the declaration stating a covenant for the lessee and his assigns and a breach by his administrator—for this is in terms a denial of the defendant's being assignee at all; the plea stating that the term did not vest in him in manner and form, &c. If *Sir W. Moore's Case* be not conclusive, then the case is of the first impression and principles must be resorted to. What are the facts? Here we have a contract by which rent is reserved; in calculating the terms of that contract, the certainty

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and duration of it are necessary and most material elements; pending the continuance of the term the lessor finds a devolution of the interest of the lessee, and treating the contract as one made *bona fide* for its full extent—treating the term as still subsisting, proceeding against the representative of the lessee for the rent in arrear. This course does not or cannot vary the liabilities of the administrator; for it is clearly settled that he cannot waive the term altogether without waiving administration and may be sued as assignee; *Rubery v. Stephens* (a); and he is personally liable for so much of rent as the land is worth, 2 *Williams on Executors*, 2 ed. 1248; when sued as administrator expressly he is personally liable to amount of assets, and may be sued in the *debet* and *detinet*; *Helier v. Casbert* (b); and when he is so sued, “if the rent be of less value than the land, as the law *prima facie* supposes, so much of the profit as suffices to make up the rent is appropriated to the lessor, and cannot be applied to any thing else; *Buckley v. Pirk* (c). True he must plead according to the rules of the action of covenant and the motive of his defence; and “if the land be of less value than the rent he may “disclose that *by special pleading*, and pray judgment whether he should “be charged otherwise than in the *detinet* only; *Buckly v. Pirk*.* And when sued as assignee, *Per Bayley, B.*, “He was by pleading to confine his “liability to the amount of assets;” *Reid v. Lord Tenterden* (d), in which case the proper plea in such cases is given. The plea in the present case is without a precedent, and tends to mislead the plaintiff as to the nature of the defence; and by the rules of pleading, “in pleading title in a “defendant, general words are sufficient where the certainty lies within “the defendant’s own knowledge;” *Derisley v. Custance* (e). And that case, and all other authorities shew that when a person is charged as assignee it is sufficient to shew that he is clothed with such a character as *prima facie* renders him liable to the covenant. The administrator is sued as assignee in respect of his presumed perception of the profits—for all the books shew that the law presumes the term of some value, in other words, that there are profits to be perceived. The grant of administration gives him a right to perceive these profits: and is it not the fair inference that the law presumes that he does perceive them unless he shews the contrary? and authority and the immemorial understanding of the profession shew that he must do so by special pleading. Here the allegation of assignment is supported by the production of the letters of administration. Secondly, if a question of evidence is left open as the pleadings are framed, entry is not necessary

(a) 4 B. & Ad. 241.

(b) 1 Lev. 127.

(c) 1 Salk. 317.

(d) 4 Twyrr. 111.

(e) 4 T. R. 75.

* See *Jevens v. Harridge*, 1 Saund. and notes thereto.

to charge an administrator as assignee; authority has presumed this an open question in the year 1834; *Nation v. Tozer* (a). *Tilney v. Norris* (b), is referred to in support of the necessity of entry, but does not contain one word in the text about it; in the marginal note to one edition it is stated, "and according to *Carthaw* that he entered;" at all events, it rests on averment in the declaration, and that averment in cases the most analogous has been decided to be an inference of law. In *Walker v. Reeves* (c), a replication traversing an averment of entry in plea of assignment held bad on demurrer, as taking issue on matter of law; for, *per Curiam*, "By the assignment the title and possessory right "passed and the assignee became possessed in law;" and the reasoning in the judgment in *Williams v. Bosanquet* (d), where all the analogous cases were reviewed, and, after much deliberation, a mortgagee was held liable to be sued for rent, &c., before entry, fully supports this view. Thirdly, if entry be necessary we have proved one, for—first, if the averment of entry be material, it is not traversed, and therefore is confessed on the record; secondly, we have proved an actual entry by several dealings with the property, the only attempt to displace which was made by shewing that a third party came into possession, but *non constat* how he held it, as he may be undertenant, &c.; *Bull v. Sibbs* (e). Fourthly, it cannot be said that the time of entry was anterior to the grant administration, for that grant relates back to the death of the intestate. In accordance with the maxim, that in relation consists equity, the doctrine of relation, while it protects the property of intestates, enforces the just liabilities of persons dealing with such property; the exceptions will be found to consist of cases in which its application would work a technical absurdity, as in the case of a release or surrender, for there the party must have a *present right*, or where it would operate as an indemnity for act done by *tortfeasors*; *Com. Dig. Administration*, B. 10; 2 *Rolls Ab. tit. Relation*, A. P.; *Brooks's Ab. Relation*, 29–46; *Lessee Ormsby v. Smith* (g); *Patten v. Patten* (h); *Rex v. The Inhabitants of Horseley* (i); *Iyons v. Muldarry* (k).—Fifthly, upon the exception, on the ground of the Judge withdrawing the other issues from the jury, *Duckworth v. Harrison* (f), is an authority.

Mr. Cooper, Q. C., and Mr. Holmes, *contra*,—

[The Court having decided, at the close of the preceding argument,

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(a) 1 Cr. M. & R. 172.

(c) Doug. 461, note.

(e) 8 T. R. 327.

(g) 4 Law Rec. N. S. 19.

(i) 8 East, 405, 410.

(b) 1 Lord Raym. 553.

(d) 1 Brod. & B. 238; S. C. 3 Moore, 500.

(f) 4 Mee. & W. 444.

(h) 1 Al. & N. 493.

(k) 1 Hayes, 530.

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that the frame of the bill of exceptions shuts out the question of actual entry]—

Proceeded to argue the case as if no entry in fact had been proved. Plaintiff had one of two courses to pursue:—he might charge the defendant as administrator, and recover against the assets; or else he might charge him as assignee, and seek then to render him personally liable, in which case the judgment is *de bonis propriis*; and having taken the latter course, he must abide the consequences of his choice. The grant of letters of administration alone is no evidence of assignment: the issue is, whether the estate be vested in the defendant by “assignment legally made;” and to sustain it *modo et formâ*, an actual assignment, or what is equivalent thereto, namely, a possession in fact, coupled with the representative character, must be proved. The plaintiff having elected to charge the defendant as assignee, there is an end of his representative character; he is left no other plea than the one he relied on; he cannot plead *plene administravit* if property be insufficient; and if the plea were bad it might have been demurred to. In all the cases in which a special plea has been held necessary, the defendant had entered. We admit that he when has done so he may be sued as assignee, *Tilney v. Norris* (a); for it is in respect of the perception of the profits that he is charged as assignee, and it is immaterial whether he has assets or not, *Heller v. Casbert*; therefore, he has not the opportunity of pleading *plene administravit*; *Buckley v. Pirk*. And if sued in covenant as assignee generally, the judgment is *de bonis propriis*; *Tilney v. Norris*, and 1 *Saund.* 2, n. 1. By this form of action, therefore, the plaintiff seeks to make the defendant, who perhaps has no assets, pay out of his own pocket the rent of premises which, it must be admitted, he did not occupy. For although true that he cannot waive the term so far as not to be liable to the amount of assets, if sued in his representative character, yet he may waive the possession, and not enter, and then he is rightly sued as administrator; *Heller v. Casbert*. The fact of entry is admitted in the pleas in *Williams v. Bosanquet* and all the other cases referred to. In *Remnant v. Bremridge* (b), it was held that an administrator sued personally for rent accruing due after intestate's death, having proved that he had waived the possession, the action could not be maintained. In *Derisley v. Custance* the heir had entered. *Williams v. Bosanquet* and the cases of actual assignment stand on totally different grounds; there the defendant has assented, by executing the assignment, to take the term at all risks, and therefore is liable, whether it be proved that he enters or not. But is an administrator who undertakes the arduous duty of protecting the property of the intestate, who is a trustee for the next of kin, perhaps interested in the

(a) 1 Lord Raymd. 553.

(b) 8 Taunt. 191; S. C. 2 B. Moore, 94.

smallest possible amount himself, is he to have the liability of an improvident lease, taken by his intestate, forced upon him? The case of *Dowell v. Dignan* (a), is precisely in point; in that case the traverse was precisely the same as in the present—the case is altogether analogous—and the defendant succeeded because the plaintiff did not shew in support of the issue that the defendant had assented to take. The law upon this subject is fully laid down in *Williams on Executors*, 1080 & 1246, and he is borne out by decided cases; *Boulton v. Canon* (b); *Sackvill v. Evans* (c); *Garth v. Taylor* (d); *Caly v. Joslin* (e); *Wilson v. Wigg* (f); *Wilkinson v. Carwood* (g). Upon withdrawing the other issues from the jury *Powell v. Sonnet* (h) was cited.

Mr. Collins, Q. C., in reply.—An administrator is chargeable as assignee with or without entry, and when so charged must plead specially to get rid of personal liability; *Maule v. Caccyffer, Executrix of M. Reade*, (i), is precisely in point; in this case there was no entry, and yet the defendant was held personally liable and put to the special plea. In *Rubery v. Stephens* also there was no entry; we have, therefore, clear authority to shew that when the administrator does not enter he is still put to his special plea to protect himself from personal liability. From *Buckley v. Pirk* to *Reid v. Lord Tenterden* the uniform current of cases shews that where an administrator is sued as assignee he must, to confine his liability to his representative character, disclose that character by special plea, on the undoubted principle that the plaintiff is presumed to be ignorant of the title of the defendant; and, therefore, by charging him generally as assignee the onus is thrown on him of divesting himself of that character. *Derisley v. Custance*. The cases of assignees of bankrupts are not analogous, their assent is necessary, but the slightest manifestation of assent is sufficient to render them chargeable as assignees, but by taking out administration administrator assents; so unless the heir assent, he is not chargeable as assignee; and, therefore, in *Dowell v. Dignan* evidence of his dissent was properly admitted, to shew that he was not assignee; but even from that case no express analogy can be collected as to what evidence is admissible under such a traverse in the case of an heir, for that case turned principally on first plea, and the issues were left by consent to the jury;—but we have express authority to shew

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(a) Batty, 698;

(b) Freem. K. B. 336.

(c) Freem. 171.

(d) Freem. 260; S. C. 2 Bac. Ab. 338.

(e) Alleyne, 34.

(f) Lev. 127.

(g) Anstruther, 905.

(h) 1 Bli. N. S. 545.

(i) Cro. Jac. 549; S. C. 2 Roll Ab. 131, *Nom Paule v. Moodie*.

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that letters of administration support the issue; *Sir W. More's case*; 1 *Smith's Leading Cases*, 21; *Com. Dig. Covt. C. 1*; "So if a man "covenant for himself and his assigns, for an executor or administrator "is an assignee;" and same principle is stated in *Anon. (a)*;—"So if "an assignee of a term covenants for himself and his executors, the executor may be charged as assignee;" *Com. Dig. Covts. C. 3*, and *Year Book*, 27 A. 8, p. 2, pl. 5. The case of *Williams v. Besanquet* puts the question beyond a doubt as to an assignee by deed: and is not the case of an assignee in law an *a fortiori* one? for where the law makes a man assignee will it not infer every thing necessary to complete that character? That it does is clearly proved by all the cases cited by Mr. O'Leary on the doctrine of relation; they shew clearly that the law invests the administrator with possession, for he may maintain possessory actions for causes of action arising before administration granted. That doctrine was introduced to protect the property of intestates; and to effect that object it is necessary that the administrator should deal with the property of the intestate immediately on his decease. Whatever the value of the term, it is admitted he cannot waive it, and it is clearly his duty to make the most of it: will not the law then infer that he deals with the term which he cannot waive so as to divest himself of all liability? Or, in other words, will not the law infer that he enters upon it? But it is said although he cannot waive the term he can waive the possession. What is the meaning of waiving the term? Is it not saying that the term did not vest in or come to him? and such is the gist of the plea in the present case. One fallacy pervades the whole of the arguments on the other side; they assume that the being chargeable and the being liable are identical: this would be true in the case of an assignee by deed; but an assignee in law has this advantage, though chargeable as such he is not necessarily personally liable as such, but may by pleading confine his liability to the amount of assets. This form of action does not, therefore, in the slightest degree vary the administrator's liability, since by disclosing his special character he may put himself in the same position as if expressly sued as administrator, and it can be no hardship on him to apprise the plaintiff of the nature of his defence. And as there are certain rules of pleading to be observed in every action; and it was perfectly optional for the defendant to plead a different plea in this case, he cannot complain of hardship when he has not thought fit to do so; and must, as in every other action, abide the consequences of the defence he has put upon the record.

Tuesday, June 16th.

RICHARDS, B.

In this case the defendant is sued as the assignee of a certain lease,

(a) Moore, 44.

and as such it is sought to charge him with rent; the defendant has pleaded that he is not assignee *modo et forma*. Upon the trial, the plaintiff proved the lease executed to the lessee, and then produced the letters of administration granted to the defendant of the goods and chattels of such lessee, and upon these he rested his case and insisted that he had a right to recover; upon the other hand, it was insisted, that the mere proof of being administrator did not make the defendant personally liable: the learned Judge being of the latter opinion directed the jury to that effect, and an exception was taken to such direction. Several cases have been cited in support of this exception, and amongst others *Reid v. Lord Tenterden*, for the purpose of shewing, that an executor sued as assignee ought to allege, that he took the premises, in respect of which he was sued, as executor or administrator, and that the profits of the premises were less than the rent, &c.; and that has been the course of pleading; where the executor has entered, and in such case it is quite right; but no case has been cited to shew such a plea, where he never entered but stood aloof from the property. I conceive where an administrator enters he is put to plead specially, as in *Reid v. Lord Tenterden*. There is no doubt that the administrator is assignee of the term, and that he may be sued in one of two ways; he may be sued as personal representative and judgment recovered against him *de bonis testatoris*; or he may be sued as assignee; but then the plaintiff is not only bound to shew that he is personal representative, but also that by entry or the like he has made himself assignee. In *Williams v. Bosanquet*, it was decided that it was not necessary that an assignee of a lease by way of mortgage should enter, to make himself liable on the covenant for payment of rent; but no case has been cited where it has been held that an administrator without entry makes himself personally liable. The law recognises the distinction between the two characters in which a personal representative may be sued; and the present case affords a strong illustration of the importance of preserving that distinction. You may sue the defendant in his character of personal representative, and you make him liable by privity of contract; and you sue him in *detinet*, although in point of law he is assignee *de bonis testatoris*: you may also sue him charging him to be assignee in fact, not upon privity of contract, but upon privity of estate, and you must lay the venue in a particular county. Does not the law here clearly recognise the distinction between an assignee in law, and an assignee in fact?

In order to sue a defendant by privity of estate, the *onus*, in my opinion, lies upon the plaintiff to shew him to be such an assignee as may be personally sued, and in such case the plea that he is not assignee *modo et forma* puts every thing in issue. A personal representative may not possibly know the multitude of premises of which the deceased was lessee, where he has not taken possession of them; and therefore it

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would be a hard law to hold the doctrine contended for by the plaintiff; whereas an executor or administrator ought not to be discouraged from undertaking the trust of administering the property of the deceased.

An heir who has not entered may protect himself when sued as assignee, and he may do this although he has taken some other estates of the ancestor; and a devisee may do the same. It has been insisted, however, that these cases are not analogous to the present, because by proving the will in one case, and taking out administration in the other, the personal representatives elect to take the property of the deceased, and that in law they cannot waive the term without waiving the administration; but may it not be said that an heir or devisee, by taking a portion of the property of the deceased, makes a similar election? I cannot admit that there is no analogy—I think there is a strong one; a personal representative it is said cannot waive the term without waiving the administration; but that rule relates merely to his liability *qua* executor, or *qua* administrator; and if they enter it is quite true they cannot waive the term; but if they never enter they do not make themselves personally liable. If it be endeavoured to make the heir liable, he may, under 11 G. 4, c. 47, plead *Riens per descent*. Neither executor, administrator, or heir, can waive the lease so as to avoid their liability; but that only refers to their liability *qua* executor, &c., and not to their personal liability. The case of *Mawle v. Cacyffer* (a), is most like this case; but in that case the defendant was liable to be sued as an executrix entering; that case, however, has not been much relied on; and upon the whole of this case I am of opinion that the judgment below was right.

FOSTER, B.

After stating the pleadings, said—The question raised in this case is, whether the general mode of pleading adopted by the defendant is sufficient for his defence? that defence being that although he was administrator he never entered. There is no difference of opinion as to whether an administrator is liable, if he never entered; but the question is, whether the defendant ought to have pleaded such defence specially and inform the plaintiff of the nature of it? That the plaintiff has a right to treat an administrator as assignee is not disputed; and this is the privilege of the plaintiff, if he treat him as personal representative he can only have judgment *de bonis testatoris*; but if as assignee and the defendant do not plead specially he will have judgment *de bonis propriis*. The reason given for this distinction is remarkable, because he cannot know the case of the defendant; and this reason applies with equal force to the defendant in the present case as it could in any other; and in accordance with all the rules regulating the necessity of special

(a) Cro. Jac. 549.

pleading, and the reason of these rules, the defendant here ought to have pleaded his defence specially. But we need not rely on principle; there are authorities to support the application of these principles to the present case. In a case like the present, no such plea is to be found as has been relied on here, and that is a strong circumstance to indicate, that such a mode of pleading is not permitted by the law. There is a remarkable precedent the other way, of an executrix pleading she had never entered; *Paule v. Moodie* (a); and also in *Rubery v. Stephens*. It is impossible to distinguish the present case from either of these cases; the one a very old, and the other a very recent case; and there is no precedent the other way: the exception must, therefore, be allowed.

There will not be any injustice, as the Court would allow the defendant to amend his plea.

PENNEFATHER B.

My opinion is that the plea is falsified by the evidence given on behalf of the plaintiff. The issue joined is upon the question whether or not all the estate and interest of the intestate in the premises vested in the defendant? that is the single question knit between the parties: and our inquiry ought to be, whether or not the evidence sustained that issue? and in strictness we ought not to inquire what would be the effect of finding one way or the other. However, as these considerations have been very much pressed upon us, and as my Brethren have gone into them, I will not abstain from them altogether; but I will first examine the issue upon the record, and see whether it was sustained by the production of the letters of administration; whether by the grant of them and by his acceptance of them, he became possessed and entitled to all the estate and interest of the lessee? I protest I cannot conceive what estate of the intestate it is that is not vested in the defendant; I cannot discover what portion of it remains uninvested in the defendant. Is it said that because the letters of administration may be revoked and granted to another, that all the estate and interest does not vest? or can it be said, because he takes as a trustee, that all the estate does not vest? If the letters be revoked the estate and interest pass to the new administrator, but in the mean time it had vested absolutely in the former administrator and nothing remained uninvested. It is essential for the administration of the intestate's affairs that this should be law; if it were not so, he could not defend the property; and therefore it is, that not only does all vest in him from the moment he obtains letters of administration, but also from the death of the intestate. In ejectment he may lay the day of demise to be the day after the intestate's death; and it vests in him in possession, for he may maintain trespass for in-

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juries done to it, which he could not do, if this were not so. But not only does all the estate and interest thus vest in the administrator, but it is also to be considered that he may shew in his pleading that he did not take possession of the property, or that it was worth nothing, or worth but little; but I question whether he could merely say he never entered; I think he would be bound to go on and shew something more than that he never took possession. The law casts upon him the possession; it enables him to bring actions, and his character of administrator obliging him to be accountable for the property of his intestate, he cannot waive the term; he is not only liable, but answerable for the value of that term to those who are entitled to the assets of the deceased; and that will afford a very good reason why in conscience the administrator is possessed of the term although he has not taken it. The case of the heir and devisee I will not say have no analogy to the present case, but they are distinguishable from it upon plain and obvious grounds. To vest an estate in an assignee there must be assent upon his part, or there must, at least, be an absence of dissent. With respect to an heir, the estate is cast upon him; he may waive the interest, where he never assented, and his plea would be maintained in point of fact. So also of an assignee in bankruptcy; he may waive also, if he do so at once, and he will not be chargeable; but if he assent for a moment he is chargeable throughout as assignee; the case of *Turner v. Richardson* (a), and the cases relied upon in that case, if authority were wanting, sufficiently bear out these positions. But an administrator, by taking out administration, assents to take the entire of the property of the intestate which the law gives him a right to; and he who does so, assents to take each and every term of which his intestate was possessed, and he cannot divest himself of it; for the law says he cannot waive the term without waiving the administration altogether. What is the meaning of waiving the term? Surely it is not waiving that which does not vest in him; and having once assented to take, by administering he cannot waive, without, as I have said, waiving the administration. That is the only meaning which, as appears to me, can be given to the expression waiving the term.

It appears to me that some confusion has arisen from the state of the law with respect to assignees generally. Formerly, entry was considered necessary to charge him, and the declarations all contain an averment to that effect; and that law was adopted not only as to assignee in fact or in law, but also whether he were subject to redemption or otherwise.

That law was laid down by Lord Mansfield in *Baton v. Jaques* (b); but that case came to be considered in *Williams v. Bosanquet*, and it was held in the latter case that entry and taking possession were per-

(a) 7 East, 3. See also *Copeland v. Stephens*, 1 B. & A. 593. (b) Doug. 455.

fectly immaterial to the question whether the estate or interest vested. I protest it appears to me that the case of an administrator is an *a fortiori* one; because in his case entry ought to be presumed, being necessary for the preservation of the intestate's estate.

If we were to consider this case upon reason and without authority, I must say that, in my judgment, the entire estate and interest of the intestate in these premises vested in the defendant. It must not be considered that this imposed any additional liability upon the defendant. He may be sued either upon the personal covenant, or as assignee; the plaintiff may elect; he cannot know what has been the profit the administrator devised from these premises, or whether he entered upon them; he has therefore a right, when he discovered that the defendant took out administration, to presume that he took possession of these premises, which I say he was bound to do, and to sue him as assignee thereof, without alluding to his character of administrator at all; and what difficulty does it impose upon the defendant to say, that the value of these premises, with the other estate of the defendant, does not enable him to pay the rent? If he were sued as administrator he should pursue this course. If, therefore, it be once admitted that he may be sued as assignee, and that does not carry his liability farther than if sued as personal representative, there is no hardship imposed upon him in requiring him to tell the plaintiff what his defence is. That this has been the understanding of the profession from the time of *Croke Elizabeth* and down to *Crompton Meeson and Roscoe*, is apparent from the authorities cited, and especially from the case of *Rubery v. Stephens*. I will add, as my Brother FOSTER put it, that no precedent is to be found seeking this defence by traversing that the estate and interest came to the defendant; no such plea is to be found in any text book or in any book of precedents; no writer asserts and no book contains the doctrine, that a person who has the whole control over property, can say he has not taken it; and in that early case, cited by Mr. O'Leary in his very concise and apposite argument, instead of relying upon the defence suggested in this case, the defendant pleaded he never entered; which is a strong authority to shew what the understanding of the profession was. In *Reid v. Lord Tenterden*, the defendant pleaded that the premises were not of the value of the rent, and his plea was held ill for not accounting for the personal estate, which shews, that although the defendant was sued as assignee, he must shew that there are not sufficient assets to pay the rent. That objection appears to have been remedied in *Rubery v. Stephens*, where the defendant being sued as assignee, pleaded he was only entitled as executor, that the premises were of no value, and that there were no other assets. He did not deny whether he entered, and that does not appear to have been considered material, as there was no demurrer upon that ground. It would appear to me,

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GREEN
v.
EARL OF
LISTOWEL.

1810.
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 GREEN  
 v.  
 EARL OF  
 LINTOWEL.

looking at the pleadings in this case, that it affords a strong authority for saying that the entry of an administrator is immaterial, and does not decide whether he is assignee or not; and also, that whether he enters or not he must account for the value of premises. With respect to the case of *Nation v. Tozer*, I will not say any thing of the conclusion to which the Court came in that case; it was very different from the present, in which the issue is knit upon a particular point; and Parke B. took especial care that the decision in that case should not be carried beyond exactly what the Court then decided; for he said, "we do not say whether he might or might not be liable jointly with his co-executor in their own right, *even without entry* by either, to an action of debt for rent accruing after the testator's death, as the term vested in both by operation of law, for, after *accepting* the executorship, neither of them could *waive the term*." It appears to me most clearly that all the estate and interest in these premises vested in the defendant, and that the production of the letters of administration proved that issue. This will not induce any greater hardship upon the personal representative; they are, I admit, to be encouraged; and that no discouragement ought to be held out to them, in any opinion to which we come, it ought not to be supposed that we are imposing any additional burden upon them: no greater hardship is imposed upon them by this decision, in this action than in an action of *assumpsit*, and every person is required to adopt the mode of pleading suited to his defence. An heir-at-law may say that he never assented to a *dam-nosa hereditas*, and if the personal representative plead the same specially, it will avail him; but in this case, proof of entry forms no part of the plaintiff's case, in sustaining the issue knit upon these pleadings. The presumption of law is, that the administrator took possession of the premises, subject, however, to be denied; and that is clearly proved by his right to maintain possessory actions, the cause of which accrued after the death and before the grant of letters of administration. It is true that in this case, as far as we have been able to consider it, we must recur to principle, although I do not think it is altogether without authority, the authority of precedents is with the plaintiff; and the opinion of the Court in *Nation v. Tozer*, as it may be collected from Parke, B., appears to lean the same way; so that although the case is of the first impression, it does not rest on principle alone, but also upon authority. There was another exception not noticed by my Brethren, namely, as to the learned Judge's withdrawing the other issues from the jury. We are all, however, of opinion that a discretion rests with the Judge to take such a course, and that he was authorised to discharge the jury from such issues.

*Venire de novo.*

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See CRIMINAL INFORMATIONS, 1, 2.

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### I. Generally.

1. The Court will not allow additional affidavits to be filed by the party who applies for a new trial in answer to affidavits filed to resist that application; but if, upon hearing the motion, the Court think it necessary, leave will then be granted to do so. C. P. *Administrator of Kelly v. Dolphin* 78
2. Where a witness to a deed of submission to arbitration refused to verify said deed by affidavit, the Court did not consider the rule requiring the affidavit to verify to be inflexible, and under the circumstances of this case, the deed was made a rule of Court without such affidavit. C. P. *Shortall v. Moran* 87
3. Where a party seeks to use affidavits somewhat irregularly, and it is apparent that if he applied to the Court he would obtain leave to use them, the Court will allow the affidavits to be used, without putting the parties to the expense of a motion for that purpose. Q. B. *Anonymous* 167
4. A motion brought on upon a notice served before the affidavits were filed upon which it was grounded, is irregular,

and will not be entertained, although copies of the affidavits be served at the same time with the notice. Q. B. *Anonymous* 169

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5. An affidavit in support of a motion to set aside the service of a writ, on the ground that it was served in the liberties of the city of L., and not in the county of L. (to the sheriff of which it was directed), or the confines thereof; *Held* to be defective, in not mentioning the particular place or part of the liberties where the defendant was served, and also omitting to negative that the defendant had been served with a copy of the writ within the proper jurisdiction. L. E. *Maguire v. Scott* 224
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7. An affidavit to hold to bail made by the plaintiff, stating that W. R. (the defendant) was indebted to the deponent in, &c., principal money, due to the deponent as the bearer on demand of a certain "check" drawn by the said W. R. on one R. R., which said check was given to deponent for value received by the said R. R. in diet, &c. found and provided by the defendant for the said R. R. and at his request, and for money lent and advanced to him, at his like request, by the deponent, and which said "check" was made payable to deponent on demand, and had been refused payment by the said R. R., to whom it was duly presented for payment; *Held*, that this affidavit was insufficient, the instrument therein set forth not being a check, but merely a written direction to R. R. to pay his own debt;

*Held also*, that this instrument could not be presumed to be a bill of exchange, inasmuch as it was not stated to be stamped. L. E. *Cleary v. Ramsay* 243

### III. When required.

8. Amendment of a plea permitted after an argument and judgment on demurrer, where the point was doubtful, although there was no positive affidavit of merits, where the question of merits must be decided on the trial. Q. B. *Hoyte v. Hogan* 331
9. In this Court, an affidavit is required to ground a motion for *further* particulars of the defendant's set-off. L. E. *Darley v. Executors of Murphy, Attorney* 381

### AGENT.

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### AMENDMENT.

#### I. After Writ of Error.

1. Where the verdict of the jury upon the substantial issues was given, and no finding appeared upon the record upon two formal issues, the Court allowed the record to be amended, by entering a verdict in conformity with the evidence, as appearing on the bill of exceptions, after writ of error sued out, and judgment pronounced in the Court of Error, and before the return of the transcript. L. E. *Quin v. National Insurance Company* 37
2. Such an application must be made in the first instance to the Court below to amend the record, and afterwards to the Court of Error to amend the transcript. *Ibid.*
3. The Court will not allow a plaintiff in error to amend his assignment of errors after special demurrer, where the amendment does not tend to the furtherance of justice. L. E. *Roddy v. Clements* 229

#### II. In Pleadings generally.

4. In an ejectment on the title, a verdict for the defendant set aside, and the declaration allowed to be amended, by altering the date of the demise, on payment of the costs incurred. L. E. *Lessee of Hayes v. Cashen* 227

5. On motion to amend a declaration by averring notice of dishonor of a bill of exchange to the personal representative of A. instead of to A., which latter was done in the declaration, it appeared that the declaration was filed as of Michaelmas Term 1837; that the defendant pleaded and issue was joined in due course; and that no further proceedings having been taken by the plaintiff at the beginning of Easter Term following, the defendant applied for judgment as in case of nonsuit, which was met on the part of the plaintiff by a peremptory undertaking to go to trial; and that in advising proofs for this trial the mistake was discovered which it was now sought to remedy, but the Court considered the application was too late, and refused the motion with costs. Q. B. *Hughes v. Parker, Administrator of Egan* 282
6. In an ejectment on the title, an amendment of the declaration permitted before defence taken, by substituting the name William for John in the description of the premises. Q. B. *Lessee O'Brien v. the Casual Ejector* 329
- 7 Amendment of a plea permitted after an argument and judgment on demurrer, where the point was doubtful, although there was no positive affidavit of merits, where the question of merits must be decided on the trial. Q. B. *Hoyte v. Hogan* 331
7. The declaration, defence, and other proceedings in an ejectment for non-payment of rent permitted to be amended by striking out the name of one of the lessors of the plaintiff, upon the terms of giving security to the defendant for costs. Q. B. *Lessee of Russell v. Tuthill* 360
8. Where the defendants had pleaded the general issue and statute of limitations, with which notice of set-off had been given, they were permitted to amend their pleas, by adding thereto a plea of set-off, upon the terms of amending plaintiff's copy of the pleas, and withdrawing their notice of set-off. L. E. *Darley v. Executors of Murphy, Attorney* 383

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## APPEARANCE.

### APPEARANCE.

See ARREST, 1, 9.

1. Where three defendants were included in one common law subpoena, and a joint appearance was entered for two of them, upon which separate declarations were filed against each; *Held*, that such declarations were regular. *L. E. Lannauze v. Stokes and others* 109
2. Where a defendant was arrested under a marked writ, and gave an undertaking to appear on the first day of the ensuing Term, or in default thereof that judgment might be marked against him; the defendant not having appeared, the Court granted an order *nisi* to the plaintiff for liberty to enter a parliamentary appearance for the defendant. *Q. B. Radford v. Bustard* 162
3. Where the process was against husband and wife, a separate appearance entered for the latter was set aside with costs, to be paid by the attorney who entered it. *L. E. Poe v. Jones and Wife* 379

### APPOINTMENT.

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### ARBITRATION.

1. Where a witness to a deed of submission to arbitration refused to verify said deed by affidavit; the Court did not consider the rule requiring the affidavit to verify, to be inflexible, and under the circumstances of this case, the deed was made a rule of Court without such affidavit. *C. P. Shortall v. Moran* 87
2. It is good cause against making an award a rule of Court that the submission to refer is not in writing; and it lies upon the party applying for that purpose to shew it was in writing. *Q. B. Goulding v. Goulding* 164
3. Either party may revoke his submission before it is made a rule of Court. *Semble, ibid.*

### ARREST.

1. Where a defendant was arrested under a writ of *capias quo minus*, in which he was described by the initial of one of his Christian names, he was discharged on entering a common appearance, although he had signed the promisory note on which he was sued by the same initial, it appearing that due

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diligence had not been used by the plaintiff to obtain a knowledge of the defendant's proper name. *L. E. Symes v. Batt* 23

2. Upon an application to be discharged under the Mutiny Act, which directs that "no person enlisted as a soldier, "or serving as a non-commissioned "officer or drummer on the permanent "staff of the disembodied militia, shall "be liable to be taken out of her "Majesty's service by any process or "execution," unless upon affidavit that the original debt amounts to £30—it must be clearly and explicitly shewn that the party applying was a soldier "duly enlisted" at the time of the arrest, and that such arrest was "contrary to the intent of the act," the provisions of which are to be construed strictly. *L. E. Pounder v. Booth* 34
3. Upon a motion to discharge a defendant from custody, upon the ground that she is a married woman, notice of the motion must be served upon the opposite party even to obtain a conditional order. *Q. B. King v. Keenan* 66
4. Where a party was in custody on a criminal charge which was abandoned, but immediately on being liberated from the dock he was taken in execution by the sheriff upon a writ of *ca. sa.* which had issued at the suit of the plaintiff, who had no connection with the prosecutor in the criminal case; *Held*, that under such circumstances he was not privileged from detainer and arrest. *Secus*—if there had been any collusion between the plaintiff and the prosecutor. *L. E. Buckmasters v. Cox* 101
5. Where a person is in custody of the sheriff upon a criminal charge, it is not necessary to obtain an order of the Court for the sheriff to detain him in a civil suit. *Ibid.*
6. In such a case the application for the prisoner's discharge may properly be made to the Court out of which the writ issued; but the Criminal Court might also take cognizance of the matter. *Per PENNEFATHER, B. Ibid.* 104
7. An application for an order to have informations returned in order to ground a motion for admitting prisoners to

bail, is not a motion of course; some ground must be stated in the affidavit.

Q. B. *Regina v. Corbett* 265

8. A party was arrested by a magistrate on suspicion of felony and sent in the custody of a policeman to the house of a person, who could not leave his bed, for the purpose of identification, and with the orders that in the event of his being identified he was to be taken from thence to gaol. The prisoner having been identified, was, in accordance with the foregoing orders, committed to gaol, and afterwards acquitted by a jury of the charge: *Held*, that in an action against the magistrate for false imprisonment, the jury were rightly charged—that the conduct of the magistrate was illegal. *Held, also*, that *bona fides* in the mind of the magistrate was no justification. Q. B. *Annette v. Osborne* 317
9. The defendant having been arrested on a marked writ, issued out of this Court, was discharged on entering a common appearance, upon the ground that his goods had been seized under an attachment from the Lord Mayor and Sheriffs' Court for the same cause of action, and that the proceedings in that Court were pending at the time of the arrest. L. E. *Daniel v. Daniel* 374
10. Where a person has by his proceedings in another Court obtained security for his demand, he shall not afterwards arrest the defendant for the same cause. *Per PENNEFATHER, B. Ibid.* 378

#### ASSIGNEE.

*See* EXECUTORS AND ADMINISTRATORS.

- R. assignee of a lease for lives, devised the lands to trustees, in trust for his wife, for life; remainder over for the whole of his interest: *Held*, that the wife was assignee of the testator's entire interest for her life. L. E. *Maunsell v. Russell* 205 note.

#### ASSUMPSIT.

*See* GUARANTIE.

#### ATTACHMENT.

1. Where a frivolous demurrer was filed, a motion to take it off the file was granted, and the party who filed it

ordered to pay costs: *Held*, that an attachment may issue for these costs, as they could not be included in the execution, not being costs in the cause. Q. B. *Anonymous* 66

2. Attachment refused against a witness to a deed of submission to arbitration for not verifying said deed by affidavit. C. P. *Shortall v. Moran* 87

#### ATTORNEY.

*See* APPEARANCE, 3.

COSTS, 7, 8.

1. In transitory actions, an attorney has the privilege of suing in his own Court and laying and retaining the venue in the county in which it is situated; notwithstanding the defendant applies on the usual affidavit to change the venue. Q. B. *Montgomery v. Cheyne* 163
2. In an action by an attorney for the recovery of a bill of costs, the venue was changed, before plea pleaded, to the adjoining county from the county of the city of L., in which the venue was laid, upon an affidavit that a fair and impartial trial could not be had there. L. E. *Boyse v. Smyth* 366

#### AVOWRY.

*See* PLEADING, 1, 2, 3, 4, 6.

#### AWARD.

*See* ARBITRATION.

#### BAIL.

*See* AFFIDAVIT, 7.

ARREST, 7.

1. Where the names in the bail-piece were different from those in the defendant's order and notice of bail, and it was not stated where it was taken, although it appeared to have been acknowledged before a Commissioner, it was held informal, and was ordered to be taken off the file. Q. B. *Anonymous* 169
2. Where, in an action against the bail, it appeared that the bail-bond was executed so long ago as the 18th of November 1837; that the bail offered to render the principal on the 21st of November, but subsequently requested the plaintiff to delay proceedings on the bond, and the principal had in the mean time become insolvent; a motion

## BAIL.

to stay proceedings was refused with costs. *Q. B. Smith, Assignee of Norris, v. Callan* 180

### BANKING COMPANIES.

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### BANKRUPT.

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*See ARREST, 3.*

### HUSBAND AND WIFE.

### BENEFICIAL INTEREST.

*See REGISTRY OF ELECTORS, 2.*

### BILL OF EXCEPTIONS.

1. The Court, with great reluctance, allowed time for filing a bill of exceptions where the trial had taken place more than two years before, although the parties had, by consents between them, extended the time until within a few days of the Term in which the application was made. *Q. B. Lessee of Dawson v. Bell* 279
2. Parties cannot by consent vary the four-day rule, without making the consent a rule of Court. *Ibid.*

### BILL OF EXCHANGE.

*See AFFIDAVIT, 7.*

#### ARREST, 1.

Where the defendant alleges that certain bills on which he is sued are forgeries, the Court will order the plaintiff's attorney to exhibit them to the defendant for inspection. *Q. B. Smith v. M'Gonegal* 272

### BILL OF PARTICULARS.

1. In an ejectment on the title, where the question was one of part and parcel, the Court, upon the application of persons served with the ejectment, who were at a loss to know the particulars of the lands sought to be recovered, made an order restraining the lessor of the plaintiff from proceeding in the ejectment, until he should furnish a bill of particulars (with a map annexed), specifying, by metes and bounds, the premises which he sought to recover. *L. E. Lessee of Ross v. the Casual Ejector* 25
2. Where the plaintiff does not furnish a bill of particulars, the defendant may move at once for them, without making any application to the plaintiff, and he

## CONSENT.

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will be entitled to the costs of the motion. *Q. B. Earl O'Neill v. Orr* 287

3. In the Court of Exchequer, an affidavit is required to ground a motion for further particulars of the defendant's set-off. *L. E. Darley v. Executors of Murphy, Attorney* 381

### BOND.

*See OYER.*

1. Where upon a motion to enter up judgment against one of three obligors in a bond, it appeared that the bond was in terms joint and several, and the warrant was to confess a "judgment or judgments," &c., in "a declaration or declarations," but in other respects purported to be joint, and not several; *Held*, that from the terms of the warrant it might be inferred that the parties had several judgments in their contemplation as well as a joint judgment, and leave was given to enter up a separate judgment against one of the obligors. *Q. B. Wallace v. Russell and others* 15
2. Judgment cannot be entered upon a joint bond and warrant against the survivor of two obligors; but the party will be left to his action on the bond. *Q. B. Coleman v. Cox* 16

### CHALLENGE.

*See GRAND JURY, 1.*

*JURY, 1, 3.*

### COMPANY.

*See PLEADINGS, 5.*

### COMPENSATION.

1. The statutes awarding compensation to the owners for malicious injury to property do not extend to the county of the city of Dublin. *Q. B. In re Miller and Dowell; In re Meade* 306
2. Those acts do not extend to any cities or towns which are counties in themselves—*Semble. Ibid.*

### CONDITIONAL ORDER.

*See ORDER.*

### CONSENT.

- Parties cannot by consent vary a rule of Court without making such consent a rule of Court. *Q. B. Lessee of Dawson v. Bell* 279

## 6 CONSIDERATION.

### CONSIDERATION.

See GUARANTIE.

### CORONER.

See GRAND JURY, 1, 2, 3.

### COSTS.

#### I. Generally.

1. Where a frivolous demurrer was filed, a motion to take it off the file was granted, and the party who filed it ordered to pay costs; *Held*, that an attachment may issue for these costs, as they could not be included in the execution, not being costs in the cause. Q. B. *Anonymous* 66
2. A party will not be allowed lump sums for the expenses of witnesses. Q. B. *Atkinson v. Carty* 170
3. Although by a former order the costs of proceedings had upon process, with which the defendant swore he had never been served, were to abide the event of a prosecution for perjury, the Court gave the costs to the defendant after a trial in which the jury disagreed; but there was strong evidence of the guilt of the process-server. C. P. *Comerford v. Burke* 197
4. The Court will not allow the costs of a motion to set aside proceedings, where the notice of the motion does not sufficiently specify the defect on which the motion is grounded. L. E. *Love-land d. Lynch v. The Casual Ejector* 246
- II. *Staying Proceedings.*
5. Where the defendant has obtained a verdict the plaintiff has no right to stop him from moving on the *postea*, by lodging with the Officer a sum sufficient for the payment of his costs, the defendant being entitled to have a judgment entered for him as a protection against a future action. L. E. *Perrin and Wright v. Hodgins* 24
6. The Court will permit the defendant to enter a rule to stay proceedings until the costs, if not going to trial, pursuant to notice, be paid, where a trial has been lost by the default of the plaintiff in not delivering the *distringas* to the sheriff in sufficient time to enable him to summon the jurors six days before the Assizes. L. E. *Gillespie v. Cum- ing* 28

## COVENANT.

### III. *Taxation of.*

7. Where an attorney delivered his bill of costs a month before action brought, and after action brought the client obtained an order to have the bill taxed, and more than one-sixth was struck off in taxation, this Court considered itself bound by the practice of the Court of Queen's Bench in England, and refused to give the client the costs of taxation, it not appearing that there was any settled practice in this Court, although they might decide differently if the matter were *res nova*. Q. B. *Hamilton and others, Attornies v. Sir George Gould, Bart.* 285
8. Copies of an attorney's bills of costs are not allowed in the taxation of the costs of an action brought to recover the same. Q. B. *Administrators of Gower v. Donovan* 333

### IV. *Abortive Trials.*

9. Where there had been three abortive trials, a juror being withdrawn by consent on the first occasion, the jury discharged by the Judge on two subsequent occasions, not being able to agree, and a verdict was had for the plaintiff at the fourth trial, and it appeared from the affidavit on the part of the defendant that additional witnesses were examined at each successive trial since the first, on the part of the plaintiff; but the plaintiff's attorney swore that the evidence upon each occasion was substantially the same: *Held*, that the plaintiff was entitled to the costs of the three abortive trials. Q. B. *Atkinson v. Carty* 170

### V. *Special Jury.*

10. Where a cause had been tried by a special jury who disagreed, and it was again tried by another special jury and a verdict given for the plaintiff, and the Judge who tried the case on the last occasion certified that the case was a proper one for a special jury: *Held*, that the party ultimately succeeding was entitled to the costs of the special jury who served upon the previous occasion. Q. B. *Ibid.*

### COUNTY.

See COMPENSATION.

VENUE, 7.

## COUNTY.

### COUNTY SURVEYOR.

See VENUE, 5.

### COURTS.

See JURISDICTION, 1, 2, 3.

The Assize Court is the same Court as that out of which the record comes.

*Semble.* Q. B. *Lessee of Boyle v. Kiernan* 273

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See PLEADING, 8.

### CRIMINAL INFORMATION.

1. In motions for leave to file criminal informations, the parties applying are bound to disclose all the circumstances connected with the transaction out of which the complaint had arisen, as the suppressal of any of them will be ground of cause against making the rule *nisi* absolute. Q. B. *Regina at the prosecution of Knox v. Anderson* 262
2. When the affidavits are contradictory, the Court will, on motion for that purpose, allow the complainant to file supplemental affidavits; but if he do not so apply, it will discharge the rule. *Ibid*

### CRIMINAL LAW.

See ARREST, 4, 5, 6, 7, 8.

1. A. was indicted at the Assizes of M. for bigamy and a verdict of guilty recorded, subject to certain objections taken to the evidence by the defendant's counsel and which were reserved for consideration of the Twelve Judges. No sentence was then pronounced. The majority of the Judges having subsequently decided against the objections, at the following Assizes counsel for the Crown called upon the Judge, who was then presiding in the Criminal Court, to pronounce judgment upon the prisoner, which he declined to do, upon the ground that the judgment being discretionary, he had not jurisdiction. The proceedings were then removed by *certiorari* into the Court of Queen's Bench, where it was *Held first*—that the next going Judge of Assize has jurisdiction, in such cases, to pronounce judgment; and *secondly*, that this Court has an inherent jurisdiction to do so in all cases, in which,

## DECLARATION.

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in the exercise of its discretion, it deems it advisable to do so. Q. B. *Regina v. Charleton* 50

2. Where two persons (a man and his wife) were found guilty of an aggravated assault, and the sentence of the Judge was, that they should be imprisoned for the space of nine calendar months, *to be kept in solitary confinement one week in every six during that period*, and to pay a fine of £500,—on a writ of error it was *Held*, that the part of the sentence that awarded solitary confinement was bad, as having been unknown as a punishment to the common law, and unauthorised by any statute, as regarded the particular offence of which they had been convicted. *Held also*, that where a sentence is bad in part it is bad in the whole, and must be reversed. Q. B. *Holland and Wife v. Regina* 335

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### DECISIONS QUESTIONED.

1. The case of *Lessee Coyne v. Bartley*, (1 Al. & N. 301) is not followed by the Court of Exchequer. *Lessee of Nerney v. Walker* 40
2. The case of *Rex v. Baker* (Carthrew 6) is not law. *Per* PERRIN J. *Regina v. Charleton* 63
3. The decision of the Court of Queen's Bench in *Tomb v. The Commissioners &c. of Belfast* (1 Ir. Law R. 164) was reversed in the Court of Error. *E. C. Tomb v. The Commissioners &c. of Belfast* 308
4. The case of *Gilman v. Connor* (1 Ir. Law R. 346) is not followed by the Court of Exchequer. *Tuthill v. Bridgeman* 361

### DECLARATION.

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Where three defendants were included in one common law *subpoena*, and a joint appearance was entered for two of them, upon which separate declarations were filed against each. *Held*, that such declarations were regular. L. E. *Lanauze v. Stokes* 109

## DEED OF SUBMISSION.

See ARBITRATION.

## DELAY.

Liberty was given to an Administratrix to proceed on giving a month's notice, after issue had been joined more than six years; upon the plea of poverty having caused the delay. C. P. *Daly Administratrix of Daly v. Kelly* 209

## DEMAND OF POSSESSION.

See EJECTMENT, 2.

## DEMURRER.

See AMENDMENT, 7,

JURY, 1, 3.

PLEADING, 1, 3, 4, 5, 6, 7, 8.

1. Where a frivolous demurrer was filed on the last day of Trinity Term and a trial at the following Assizes thereby lost, the Court set it aside, and would not allow the defendant in to plead. Q. B. *Scully v. O'Brien* 14
2. The Court will not allow a plaintiff in error to amend his assignment of errors after special demurrer, where the amendment does not tend to the furtherance of justice. L.E. *Roddy v. Clements* 229
3. Where a party applies for leave to mark judgment on the ground that his opponent has neglected to supply his portion of the demurrer books; *Held*, that notice must be given of such application. Q. B. *Roches v. Hackett* 278
4. The Court will allow a plaintiff to mark judgment where the defendant has taken a demurrer, and has neglected to furnish the points to be argued, although called upon to do so, notice of this motion having been given. Q. B. *Willne v. O'Connor* 284

## DETAINDER.

See ARREST, 4, 5, 6.

## DEVISE.

See ESTATE IN FEE.

## DISCHARGE FROM CUSTODY.

See ARREST—*Passim*.

## DISTRINGAS.

See NEW TRIAL.

## DRAWING OUT MONEY.

See LODGING AND DRAWING OUT MONEY

## DUBLIN.

See COMPENSATION.

## DUPLICITY.

See PLEADING, 6.

## EJECTMENT.

See LIMITATIONS, STATUTE OF, 8.

## I. On the Title.

1. Where in an ejectment on the title by the executors of a co-lessee in a lease for years, it appeared that the granting part of the lease gave separate portions at separate rents to the respective lessees, but the *habendum* and covenants in the lease were joint; and it further appeared that the testator died leaving the co-lessees surviving, and his widow who subsequently married the defendant; and that the widow and the defendant continued since the death of the testator to pay rent, sometimes to the executors and sometimes to the head landlord, until the time of bringing the ejectment; upon the trial a verdict was had for the plaintiff subject to three objections which were reserved, with liberty for the defendant to move to enter a non-suit; first, that the lease was a separate lease for the three tenants respectively and could not be received in evidence, as it had but one stamp and ought to have had three; secondly, that by being received in evidence it was established as a joint lease, and the executors had no interest, as the co-lessees took by survivorship, or, if the deed operated as a deed of partition as well as a lease, it required an agreement stamp; and thirdly, that the payments of rent by the defendant and his wife constituted a tenancy from year to year. On motion to set aside the verdict and enter a non-suit upon these grounds; *Held*, first, that the lease was a joint lease; secondly, that the lease required an agreement stamp; thirdly, that there was evidence to go to the jury of a tenancy from year to year, and which question ought properly to have been left to them; but as the result would be the same upon a new trial,

## EJECTMENT.

- the Court refused to grant one, and made the rule for the non-suit absolute. Q. B. *Lessee of Kennedy v. Hayes* 186
2. In ejectment on the title the plaintiff proved a lease of 1775, made by his grand-father and receipt of rent reserved thereby from R., for some time previously and up to 1833, R. not being in possession or shewn to be connected with the lease of 1775 otherwise than by payment of rent in amount the same as that reserved by the lease; he further proved that he was heir at-law of the lessor, and that the lease had expired; it also appeared that the defendant and some others were in possession for several years, and had not paid any rent to the lessor; but that in the August preceding the trial, being about four years after the death of the last surviving *cestui que vie* in the lease, a distress was made on the part of the lessor, but subsequently abandoned without any thing being levied under it; *Held*, that under such circumstances a notice to quit or a demand of possession was not necessary before bringing the ejectment. Q. B. *Lessee of Bagwell v. Boland* 293
3. Where in 1768 a tenant demised for three lives in pursuance of a supposed covenant for perpetual renewal at £28, and his son, also tenant for life under a subsequent settlement in 1806, and again in 1820, at each time on the fall of a life in the lease of 1768, demised by way of renewal in pursuance of a supposed covenant for renewal, and died in 1830, when the remainder-man, the lessor of the plaintiff, entered and continued to receive the rents until 1836, when on the death of the last *cestui que vie* in the original lease, he brought his ejectment after a demand of possession but without notice to quit: it appeared that the value of the premises was about £400 a year. *Held*, that the question of a tenancy from year to year was properly left to the jury, and that they having found in the affirmative that the verdict ought to stand. Q. B. *Bell d. Smyth v. Nangle* 296
11. *For non-payment of Rent.*
4. In an ejectment for non-payment of rent, an office copy of the ejectment and affidavit of service duly attested by

## EJECTMENT.

9

- the Filacer, is sufficient evidence of these documents on the trial of the ejectment in the Assize Court, without proof that they have been examined. Q. B. *Lessee of Boyle v. Kiernan* 273
- III. *Under 1 G. 4, c. 87.*
5. Where a tenant held under a lease for one life and forty-one years to commence from the death of the *cestui que vie*, and by a subsequent deed the parties agreed that *cestui que vie* died upon a certain day, an ejectment having been brought against the tenant under the 1 G. 4, c. 87, and a conditional order obtained, requiring the tenant to enter into the terms by that act prescribed, before being admitted to take defence; it was insisted as cause that the term was uncertain and that the order was irregular in not stating that the deeds under which the tenants held were produced in Court when it was obtained, and the Court refused to make the order absolute. Q. B. *Lessee of Orpen v. The Casual Ejector.* 291
- IV. *Writ of Restitution.*
6. Where seven persons applied for a writ of restitution, upon the ground that they were dispossessed of their holdings under an *habere*, and stated in their affidavit, that their holdings formed no part of the premises in the ejectment, and were not pointed out as part of the premises sought to be recovered, to the view jury who tried the case, and it was answered that as to four of the tenants, they had accepted new agreements since they were dispossessed, and that the other three were not dispossessed, for they did not then occupy any part of the premises, the Court refused the writ. Q. B. *Lessee of Wynne v. Swift* 159
- V. *Practice in.*
7. Where it appeared that an ejectment was brought against certain lands, and several undertenants were dispossessed under the *habere* upon the 10th of January 1838, but allowed to return into possession and remain undisturbed until the 11th of January 1840, when they were again dispossessed by virtue of an *habere* upon a judgment in *scire facias* in this cause, and of the proceedings in which the several tenants swore they had no notice whatever: *Held*, that a

## 10 EJECTMENT.

writ of restitution should issue to restore these parties to their possession. Q. B. *Lessee of Ashley v. The Casual Ejector* 264

8. In an ejectment on the title, where the question was one of part and parcel, the Court upon the application of persons served with the ejectment, who were at a loss to know the particulars of the lands sought to be recovered, made an order restraining the lessor of the plaintiff from proceeding in the ejectment, until he should furnish a bill of particulars (with a map annexed) specifying by metes and bounds the premises which he sought to recover. L. E. *Lessee of Ross v. The Casual Ejector* 26
9. In an ejectment on the title, a verdict for the defendant set aside, and the declaration allowed to be amended, by altering the date of the demise, on payment of the costs incurred. L. E. *Lessee of Hayes v. Cashen* 227
10. The affidavit of the service of an ejectment on the title must be entitled in strict accordance with the frame of the demises as laid in the declaration. L. E. *Loveland d. Lynch v. The Casual Ejector* 240
11. *Semble*—That the practice of reviving judgment in ejectment upon *nils* is irregular. Q. B. *Lessee of Ashley v. The Casual Ejector* 264
12. In an ejectment on the title, an amendment of the declaration permitted before defence taken, by substituting the name of William for John in the description of the premises. Q. B. *Lessee of O'Brien v. The Casual Ejector* 329
13. The declaration, defence, and other proceedings in an ejectment for non-payment of rent, permitted to be amended by striking out the name of one of the lessors of the plaintiff, upon the terms of giving security to the defendants for costs. Q. B. *Lessee of Russell v. Tuthill* 360

### ELEGIT.

A return to an *elegit*, stating that the sheriff has delivered a moiety of the lands by "metes and bounds:" *Held*, by the Court of Exchequer to be a sufficient return. L. E. *Lessee of Nerney v. Walker* 39

## ESTATE.

### ENROLMENT.

*See JUDGMENT*, 13, 16.

### ESCHEAT.

*See CROWN*.

### ESTATE.

1. Where the testator after devising an annuity to his wife, charged on part of his real estate, devises a portion of that estate, together with other parts of his real estate to W. T. and his heirs, "but if W. T. shall die in the lifetime of my wife, or afterwards without issue or heirs male lawfully begotten, living at his death, or if living, who shall happen to die before they attain twenty-one, then I devise my estate and interest therein to P. T.; and further after my wife's death, I devise to the said P. T., and his heirs, my fee-simple estate in A., and my freehold property in B.; but if P. T. shall die without heirs male, lawfully begotten in the lifetime of W. T., then I devise such my estates so devised to P. T. to W. T. and his heirs; and if W. T. shall die without such heirs as herein already mentioned, then after the death of the survivor of them I devise my said estates to my sisters S. and A. F., and their heirs:" *Held*, that W. and P. T. in the original devises to them took estates in fee or quasi fee, subject to executory devises over: *Held also*, that W. T. having died in the lifetime of P. T., without leaving issue male, P. T. took in the estates devised to W. T. an estate in fee or quasi fee, subject to an executory devise over: *Held also*, that S. T. having survived A. T., who died in the lifetime of P. T. unmarried and without issue, the said S. T. took in all the premises devised an estate in fee or quasi fee by way of executory devise. Q. B. *Tisdall v. Tisdall and others* 41
2. Where the testator being seized in fee of certain freehold premises, devised same to trustees, their heirs, &c., "upon trust to receive and take the rents, &c., thereof, and pay and apply the same unto my dear Mary Anne, for her own sole and separate use, notwithstanding any future husband she may marry,

"and that her receipt only to my trustees shall be good and effectual discharges from time to time for the same, and from and immediately after the decease of my said dear wife, in trust for such person or persons, and in such manner and form as my said dear wife shall, by any deed or will duly executed and attested, give, direct, and appoint the same; and I give, devise and bequeath unto my said dear wife, all and singular, my goods, chattels, monies, debts to me owing, monies in the funds, and effects and property, of what nature or kind soever the same may be, for her own sole and absolute use for ever." And he then appointed his wife sole executrix of his will: *Held*, that under the clause of the will which terminates with the words "direct and appoint the same," the testator's wife took in the freehold premises thereby devised to her an estate for her life only, with a power of appointment by any deed or will duly executed and attested, supposing such estate to be legal and not equitable: *Held also*, that under the clause of said will, commencing with the words, "and I give, devise and bequeath unto my said dear wife," she took an estate in fee-simple in said freehold premises, contingent upon her not executing the power of appointment given to her by said will, and supposing such estate to be legal, and not equitable. Q. B. *Boyser v. Blair* 149

## EVIDENCE

See NEW TRIAL, 1.

1. In an action of trespass for *mesne* profits, in which the general issue only is pleaded, the judgment in ejectment is conclusive evidence of the plaintiff's title, whether that judgment has been obtained on verdict or by default. L. E. *Lessee of Armstrong v. Norton* 96
2. Where an action of trespass for *mesne* profits is brought against a party who has let judgment in the ejectment go by default, an attested or examined copy of the affidavit of the service of the ejectment is sufficient evidence of the fact of such service in the action for *mesne* profits. *Ibid.*
3. The presumption of a defendant's lia-

bility to tithe composition, arising from his possession of the lands, is not rebutted by the statement of the plaintiff's witness, the land agent of the defendant, that there has been an outstanding lease, and that the defendant had entered into the possession of the land upon a *parol* surrender, without any instrument in writing, the defendant in such circumstances not falling within either of the exceptions contained in the 12th section of the 2 & 3 W. 4, c. 119, being neither a tenant from year to year nor at will, within the meaning of the act. L. E. *Lord Shannon v. Stoughton* 215

4. In an ejectment for non-payment of rent, an office copy of the ejectment and affidavit of service, duly attested by the Filacer, is sufficient evidence of these documents on the trial of the ejectment in the Assize Court, without proof that they have been examined. Q. B. *Lessee of Boyle v. Kiernan* 273
5. Proof of the letters of administration, without proof of entry, is sufficient evidence to charge an administrator, who is sued as assignee generally of a term, and pleads he is not such assignee, in an action of covenant for rent arrear. L. E. *Assignee of Green v. Listowell* 384

## EXCEPTIONS.

See BILL OF EXCEPTIONS.

## EXECUTION.

See ARREST, 4, 5, 6.

## EXECUTORY DEVICES.

See ESTATE, 1.

## EXECUTORS AND ADMINISTRATORS.

See DELAY.

1. Covenant for rent arrear against the administrator of a lessee for years. The declaration stated that "all the estate, &c., term of years to come and unexpired, property, profit, &c., in said premises, by assignment thereof, came to and vested in the defendant, who thereupon then and there entered into and upon all and singular the said premises, and was thereof possessed from thence hitherto." The

defendant pleaded nine pleas:—1st, *non est factum*; 2dly, that the estate, &c. did not vest in him *modo et forma*. Upon the latter plea issue was joined, and the questions in the case turned entirely upon this issue. To support it, the plaintiff gave in evidence the lease and the letters of administration of the goods &c. of the lessee granted to the defendant and rested his case upon these. The learned Judge directed the jury to find for the defendant, unless they believed he was assignee in any other way than as administrator. They found for the defendant. To this direction an exception was taken by the plaintiff; *Held*, that proof of the letters of administration, without proof of entry by the administrator, sustained the above issue; *RICHARDS, B., dissentiente*, his Lordship being of opinion that the personal representative being sued as assignee generally, the *onus* lay upon the plaintiff to shew that he was such assignee, not alone by proof of the letters of administration, but also by entry or the like, and that in such case the plea that he is not assignee *modo et forma* put every thing in issue. *L. E. Assignee of Green v. Listowell* 384

2. In this case, issue having been joined upon the first eight pleas, and the jury having given a verdict for the plaintiff upon the first issue, and for the defendant on the second:—*Held*, that the learned Judge was authorised in withdrawing the remaining six issues from the jury, it being a matter for the exercise of his discretion. *Ibid.*

#### FALSE IMPRISONMENT.

A party was arrested by a magistrate on suspicion of felony and sent in the custody of a policeman to the house of a person, who could not leave his bed, for the purpose of identification, and with the orders that in the event of his being identified he was to be taken from thence to gaol. The prisoner having been identified, was, in accordance with the foregoing orders, committed to gaol, and afterwards acquitted by a jury of the charge: *Held*, that in an action against the magistrate for false imprisonment, the jury were

#### GUARANTIE.

rightly charged—that the conduct of the magistrate was illegal. *Held also*, that *bona fides* in the mind of the magistrate was no justification. *Q. B. Annette v. Osborne* 317

#### FORGERY.

*See BILLS OF EXCHANGE.*

#### FOREIGN ATTACHMENT.

*See ARREST, 9, 10.*

#### GRAND JURY.

1. A challenge does not lie to a grand juror. *Q. B. Ex parte Nowlan* 7
2. The coroner of the county of the city of Dublin is not disqualified, at common law or by statute, from serving upon grand juries for the county of the city of Dublin. *Ibid.*
3. The Court of Queen's Bench has jurisdiction to set aside an incompetent person, when called upon the grand jury panel.—*Semble. Ibid.*
4. Where a presentment was passed in Easter Term 1839, and two traverses taken to it—one for intility, and the other for damages—by the same person; *Held*, that the Court will not, upon motion by that person to quash the presentment in the following Michaelmas Term, attend to objections as to the insufficiency of the affidavit and estimate, upon which the presentment was founded. *Held also*, that the presentment being expressed to be made upon condition that a certain sum would be advanced by the Board of Works and Mr. L., did not render the presentment void. *Q. B. Regina v. M'Kay* 16

#### GROCER.

*See SPIRIT LICENSE.*

#### GUARANTIE.

A guarantie in the following words:—  
 "Cork 31st of January, 1837. "Sirs,  
 "I will be accountable to you for  
 "payment, within six months, of the  
 "seed order forwarded by my son R.  
 "A. H., and also for payment, within  
 "three months, of 600 barrels of vetches,  
 "to be forwarded by the first steamer.  
 "I am, &c., S. H. (the defendant). To  
 "Messrs. N. & Co." (the plaintiffs).—

*Held*, that the consideration sufficiently appeared on the face of the instrument to charge S. H. with the price of the seed order. *Held also*, that this guarantie was not entire; and although the vetches were never forwarded, that the plaintiffs were entitled to recover the price of the seed order which had been forwarded. *Q. B. Nash & Co. v. Hartland* 190

HANDWRITING.

*See* NEW TRIAL, 1.

HUSBAND AND WIFE.

*See* ARREST, 3.

JUDGMENT, 1, 5.

Where the process was against husband and wife, a separate appearance entered for the latter was set aside with costs, to be paid by the attorney who entered it. *L. E. Poe v. Jones* 379

INFORMATION.

*See* ARREST, 7.

CRIMINAL INFORMATION, 1, 2.

INSPECTION.

*See* OYER.

Where the defendant alleges that certain bills of exchange on which he is sued are forgeries, the Court will order the plaintiff's attorney to exhibit them to the defendant for inspection. *Q. B. Smith v. M'Gonegal* 267

INTEREST.

Upon motion for liberty to issue a *scire facias* to revive a judgment nearly 20 years old, the affidavit must state by whom payments of interest have been made. *Q. B. Crenim v. Stephenson* 287

ISSUES.

*See* EXECUTORS & ADMINISTRATORS, 2.

JOINT TENANTS.

*See* REGISTRY OF ELECTORS.

JOINT LEASE.

*See* LEASE.

JUDGMENT.

*See* LIMITATIONS STATUTE OF.

I. *Entry of.*

1. Where a motion was made on behalf of the wife to enter up judgment in the names of the trustees in a marriage set-

tlement, upon a bond and warrant of the husband's passed for the amount of the wife's property; and it appeared that the trustees refused to enter judgment, that one of them had issued an attachment against the obligor's goods, and that the sum secured on the bond would be lost; but the trustees had not received specific notice of this motion, the Court refused the application. *Semble*—That the proper course is to file a bill in Equity. *Q. B. Campion v. Campion* 13

2. Where upon a motion to enter up judgment against one of three obligors in a bond, it appeared that the bond was in terms joint and several, and the warrant was to confess a "judgment or judgments," &c., in "a declaration or declarations," but in other respects purported to be joint, and not several; *Held*, that from the terms of the warrant it might be inferred that the parties had several judgments in their contemplation as well as a joint judgment, and leave was given, as applied for, to enter up a separate judgment. *Q. B. Wallace v. Russell and others* 15

3. Judgment cannot be entered upon a joint bond and warrant against the survivor after the death of one of the obligors, but the party will be left to his action on the bond. *Q. B. Coleman v. Cox* 16

4. Where the defendant has obtained a verdict the plaintiff has no right to stop him from moving on the *postea*, by lodging with the Officer a sum sufficient for the payment of his costs, the defendant being entitled to have a judgment entered for him as a protection against a future action. *L. E. Perrin and Wright v. Hodgins* 24

5. A motion to set aside a judgment entered on a bond and warrant of attorney executed by a married woman, refused under the circumstances of the case, the application not having been made in proper time, and the conduct of the applicant not having been such as to entitle her to relief upon motion. *L. E. Roddy v. Clements* 229

6. The Court of Exchequer will allow judgment to be entered on a Kerry bond at the suit of the executor of the obli-

- gee against the obligor. L.E. *Executor of Adams v. Houston* 241
7. After the Court gives judgment, on motion to enter a non-suit, or for a new trial, it is not necessary to enter the four-day rule for judgment, but judgment may be signed immediately where there is no reservation in the conditional rule. Q.B. *Lessee of Boyle v. Kiernan* 273
8. Where a party applies for leave to mark judgment, on the ground that his opponent has neglected to supply his portion of the demurrer books; *Held*, that notice must be given of such application. Q.B. *Roche v. Hackett* 278
9. The Court will allow a plaintiff to mark judgment where the defendant has taken a demurrer, and has neglected to furnish the points to be argued, although called upon to do so, notice of this motion having been given. Q.B. *Willne v. O'Connor* 284
- II. *Revival of.*
10. *Scire facias* to revive a judgment against the heir and terretenants of the conusor. Judgment of 1814, the conusor an insolvent in 1819; judgment debt in his schedule of debts, filed 1st December 1817: upon the ground that this was a sufficient acknowledgment in writing within the 3 & 4 W. 4, c. 27, the Court allowed the *scire facias* to issue, upon the terms of serving the heir personally, and not reviving on *nils*. Q.B. *McCarthy v. O'Brien* 67
11. Where it appeared that a judgment of T. T. 1817 was obtained against A., who had since died, that in 1831 a *scire facias* issued, but no further proceedings were had thereon, and that in 1835 the judgment was redocketed, the Court gave liberty to issue a *scire facias* against the heir and terretenants of the conusor, without prejudice to any questions arising upon the 3 & 4 W. 4, c. 27 (statute of limitations). C. P. *Kelly v. The Heir and Terretenants of Croghan* 88
12. The period of limitation prescribed by the 3 & 4 W. 4, c. 27, s. 4, begins to run against a judgment from the date of the last revival, and not from the entry of the original judgment. E. C. *Beresford v. Farran* 110

13. A judgment of revival of T. T. 1823 was ordered to be now enrolled as of that Term, although the original pleadings in *scire facias* were not forthcoming; it appearing to the Court that the party had done all that he had to do to have the judgment regularly entered, and that it was through an omission or mistake in the office that such had not been done. C. P. *Martin v. McCausland* 201
14. The practice of reviving judgment in ejectment upon *nils* is irregular. Q. B. *Lessee of Ashley v. The Casual Ejector* 264
15. Upon motion for liberty to issue a *scire facias* to revive a judgment nearly twenty years old, the affidavits must state by whom payments of interest have been made. Q. B. *Crenim v. Stephenson* 287

### III. *Assignment of.*

16. Where a judgment has been assigned to new trustees by a person appointed for that purpose pursuant to an order of the Court of Chancery, made upon petition under the 1 W. 4, c. 60, the Court of Exchequer will on motion direct the proper Officer to enter and enrol the assignment thereof. L. E. *Burrowes v. Hogan* 369  
See also *Armit, assignee of Burroughs, v. Viscount Ferrard* 372

### IV. *Satisfaction of.*

17. The defendant applied for liberty to lodge the sum which he alleged was due by him to the plaintiff on foot of two judgments recovered against him, and for an order upon the plaintiff to execute warrants of attorney to satisfy same; it appeared that there was a difference as to the time to which the defendant was bound to pay interest upon them, and also that the defendant was guilty of *laches* in not making an earlier application: the Court refused the motion. Q. B. *Quin v. Eastwood* 165
- V. *As in case of Non-suit.*
18. Where a record is brought down to trial, and withdrawn with the assent of the defendant, he cannot have judgment as in case of non-suit. Q. B. *Anonymous* 167
19. The meaning of the rule, as to bringing down the record, is not merely

bringing it down and entering it, but proceeding to trial, unless the cause be made a *remanet*. *Ibid*.

20. Upon shewing cause against a conditional order for judgment as in case of non-suit, it appeared that notice of trial was served before the motion came on, that the sum sought to be recovered was only £5; and an affidavit by the plaintiff stated that he had a just and good cause of action: *Held*, that this was sufficient cause, and the rule was discharged. Q. B. *Anonymous* 263
21. Where in an action for false imprisonment, arising out of a disputed right of fishing, the cause had been at issue since M. T. 1838, and the delay from thence until June following was not accounted for, except by an allegation that the principal action to try the right was pending during that time, and since June the plaintiff was unable to proceed in consequence of the illness of his attorney: *Held*, that the cause was insufficient, in not accounting sufficiently for the delay previous to June, and the rule was made absolute with costs. Q. B. *— v. Worthington* 266
22. The general rule is not to allow an amendment after peremptory undertaking to go to trial. *Per* PERRIN, J. Q. B. *Hughes v. Parker* 284
23. By the practice of this Court a peremptory undertaking to go to trial at the next Sittings or Assizes, is considered as "just cause" against a motion for judgment as in case of a non-suit. L. E. *Tuthill v. Bridgeman* 361

#### JURISDICTION.

1. The Court of Queen's Bench has jurisdiction to set aside an incompetent person when called upon a grand jury panel.—*Semble*. *Ex-parte Nowlan* 7
2. Where a prisoner was convicted of bigamy at the Assizes, subject to certain objections reserved for the consideration of the Twelve Judges, and no sentence was then pronounced; and the objections having been overruled at the subsequent Assizes the presiding Judge considered he had not jurisdiction to pronounce sentence, the punishment being discretionary. The proceedings were then removed into the Court of Queen's

Bench, where it was *Held*, first, that the next going Judge of Assize has jurisdiction in such cases to pronounce judgment; and, secondly, that that Court has an inherent jurisdiction to do so in all cases in which, in the exercise of its discretion, it deems it advisable to do so. Q. B. *Regina v. Charleton* 50

3. Where a person who had been in custody on a criminal charge being about to be discharged, was detained by the sheriff under a *ca. sa.*, the application for his discharge may properly be made to the Court out of which the writ of *ca. sa.* issued; but the Criminal Court might also take cognizance of the matter. L. E. *Per* PENNEFATHER, B. *Buckmasters v. Cox* 104

#### JURY, COMMON AND SPECIAL.

*See* Costs, 9, 10.

1. Defendant put in a challenge to the array because the jurors in this case, or any of them, were not summoned to serve upon the said jury six days before the day named; the plaintiff replied that there was another *distringas* lodged with the sheriff, and that the jurors were summoned thereon six days, &c., and that they were the same jurors named in the *distringas* lodged in this case and that they were in attendance ready to be sworn; a demurrer to this replication was overruled. C. P. *Keogh v. Walker* 210
2. Where a cause had been tried by a special jury, and upon a bill of exceptions having been taken a *venire de novo* was awarded, and the defendant brought down the cause by *proviso*; it appeared that upon the latter occasion the *distringas* was in the common form, except that the words "by proviso" were written under the Officer's name, and it was objected at the trial, first, that the *distringas* was informal and irregular; and, secondly, that the special jury which had been struck previous to the former trial was the proper jury to try the case; the Court overruled the objections, and refused to disturb, upon these grounds, a verdict had for the defendant. Q. B. *Bell d. Smith v. Nangle*. 296
3. Where the defendant in a city cause challenged the array of the panel, be-

cause six days before the first day of the *Nisi Prius* Sittings the jurors empanelled were not, nor was any of them, nor any jury of the county of the city, &c. summoned to serve upon the jury for the trial of the issue in that cause, by virtue of any writ of *venire facias*, *distringas*, &c.; a demurrer taken to the challenge was overruled. *L. E. Waters v. Hughes* 362

4. Form of rule for special jury when obtained by defendant after notice of trial served. *L. E. Woods v. Sandford* 380

### JUSTICE OF THE PEACE.

See FALSE IMPRISONMENT.

### JUSTIFICATION.

See FALSE IMPRISONMENT.

### KERRY BOND.

See JUDGMENT.

### LACHES.

See DELAY.

JUDGMENT, 17.

### LAND.

See NEW TRIAL, 3, 4.

### LANDLORD AND TENANT.

See EJECTMENT, *passim*.

- 1 The 3 & 4 *W. 4*, c. 27, applies to conventional rents between landlord and tenant. *Q. B. Wilson in replevin v. Jackson* 1
- 2 Are arrears of rent reserved by indenture within the 42d section of the 3 & 4 *W. 4*, c. 27? *Quære. C. P. Armstrong v. Lloyd* 70

### LEASE.

Where a lease made to several, in the granting part gave separate portions at separate rents to the respective lessees, but the *habendum* and covenants in the lease were joint, the Court held that it was a joint lease. *Q. B. Lessee of Kennedy v. Hayes* 186

### LEASE RENEWABLE FOR EVER.

See EJECTMENT, 3.

POWERS.

### LEASES FOR LIVES.

Leases for lives do not *escheat* to the

Crown. *Semble. Q. B. Tisdall v. Tisdall and others* 41

### LIMITATIONS, STATUTE OF.

See SERVICE, 7.

#### I. Generally.

1. In replevin the plaintiff declared for a taking on the 9th of August 1838, and the defendant avowed for five years' arrears of rent next before and ending on the 25th of March 1836, due to the defendant by virtue of a demise theretofore made. To this avowry the plaintiff pleaded, amongst other pleas, a plea of the 3 & 4 *W. 4*, c. 27, s. 42, to the whole amount of the arrears; the defendant demurred principally on the ground that the plea of the statute should have been confined to the period of the five years which were outside six years, but the Court overruled the demurrer. *Q. B. Wilson in replevin v. Jackson* 1
2. The 3 & 4 *W. 4*, c. 27, applies to conventional rents between landlord and tenant. *Q. B. Ibid.*
3. Are arrears of rent reserved by indenture within the 42d section of the 3 & 4 *W. 4*, c. 27? *Quære. C. P. Armstrong v. Lloyd* 70
4. Where it appeared that a judgment of T. T. 1817, was obtained against A. who had since died; that in 1831 a *scire facias* issued, but no further proceedings were had thereon; and that in 1835, the judgment was redocketed; the Court gave liberty to issue a *scire facias* against the heir and terretenants of the conusor, without prejudice to any questions arising upon the 3 & 4 *W. 4*, c. 27. *C. P. Kelly v. The Heir and Terretenants of Croghan* 88
5. The period of limitation prescribed by the 3 & 4 *W. 4*, c. 27, s. 40, begins to run against a judgment from the date of the last revival, and not from the entry of the original judgment: *Foster, B. dissentiente. L. E. Beresford v. Farran* 110
6. To a *scire facias* to revive a judgment brought by the executors of the conusor against the heir and terretenants of the conusor, the defendant, a terretenant, having pleaded the 40th section of the above statute, the plaintiffs replied a judgment of revivor recovered by them-

selves against the conusor within twenty years next before the issuing of the *scire facias*: *Held*, on demurrer, that the replication was good. *Ibid*.

7. The 3 & 4 W. 4, c. 27, s. 2, does not apply to claims for tithe composition, as between the tithe claimant and the owner of the land; but only to estates in tithe. *Semble*. L. E. *Lord Shannon v. Hodder* 223 note.

#### II. Adverse Possession.

8. Adverse possession within the meaning of the 15th section of the 3 & 4 W. 4, c. 27, is not an adverse possession for twenty years: *Held*, therefore, that an adverse possession of twenty years, without payment of rent or an acknowledgment of title, was sufficient to bar an ejectment brought for the recovery of lands where the possession was adverse at the time of the passing of the act; although such possession had not been adverse for a period of twenty years. L. E. *Lessee O'Sullivan v. M'Sweeney* 89

9. The withholding of the tithe composition by the occupier of the land was not such an adverse possession at the time of the passing of the 3 & 4 W. 4, c. 27, as is meant in the 15th section of that statute. L. E. *Lord Shannon v. Hodder* 224

#### III. Acknowledgment in Writing.

10. Where certain suits were pending in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others, he reported B. a creditor by a judgment affecting them for a certain sum; *Held*, that this was not such an acknowledgment in writing by the agent of A. to B. or to his agent as would take the case out of the statute of limitations. Q. B. *Hill, Assignee of D'Courcy v. Stawell* 302

#### LODGING AND DRAWING MONEY.

*See* JUDGMENT, 16.

1. Where a sum of money is lodged in Court by a sheriff until the conflicting claims of two parties are decided, the party found entitled may, when inconvenient to himself to attend, obtain an

order for his attorney duly authorised, to accept the transfer. Q. B. *Desmond v. Desmond* 160

2. A motion on behalf of the sheriffs of the city of Dublin to lodge money in Court until the adverse claims of parties were decided was refused, the Court being of opinion that the sheriffs did not act *bona fide*. Q. B. *Ramsden v. Conry* 175

#### LORD MAYOR'S COURT.

*See* ARREST, 9, 10.

#### MAGISTRATE.

*See* ARREST, 8

FALSE IMPRISONMENT.

#### MALICIOUS INJURIES.

1. The statutes awarding compensation to the owners for malicious injuries to property do not extend to the county of the city of Dublin. Q. B. *In re Miller & Dowell. In re Meade* 306
2. Those acts do not extend to any cities or towns which are counties in themselves. *Semble. Ibid*.

#### MARRIED WOMAN.

*See* ARREST, 3.

JUDGMENT, 1.

#### MESNE PROFITS.

*See* TRESPASS, 1, 2.

#### METES AND BOUNDS.

*See* BILL OF PARTICULARS, 1.

#### MONEY.

*See* LODGING AND DRAWING OUT MONEY.

#### MOTION.

1. Where a conditional order was sought for a *habeas corpus* to remove children from the custody of one of the parents, and the circumstances which created the necessity of the writ were domestic differences, which, it was stated, it would be distressing to all parties concerned to have made public, the Court directed the affidavits to be handed in for their perusal, and did not require that they should be stated at the bar. Q. B. *Anonymous* 160
2. A motion brought on upon a notice served before the affidavits were filed,

on which it was grounded, is irregular and will not be entertained, although copies of the affidavits be served at the same time with the notice. Q. B. *Anonymous* 169

3. The defendant is entitled, on the last day of Term, to discharge the plaintiff's notice of motion with costs, it not being in the list. On any other day in Term the course would be to put it in the list and move to have it discharged with costs. C. P. *Laird v. Laird* 210

#### MUTINY ACT.

See ARREST, 2.

#### NEW TRIAL.

##### I. Generally.

1. In an action against the defendant as the acceptor of three bills of exchange, the plaintiff produced three witnesses, one of whom, who had but imperfect means of knowing the defendant's handwriting, after stating his belief that two of the bills were accepted in the handwriting of the defendant, admitted that he thought the acceptance of one of the bills as more like the handwriting of the defendant than the other; the second witness having also given general evidence as to his belief of these two acceptances being in the defendant's handwriting, gave the same evidence as the former witness as to one of the acceptances being more like his handwriting than the other, and added that the handwriting of the defendant's nephew was very like the defendant's; the third witness swore positively that neither of these bills was in the handwriting of the defendant and that one of them was written by his (the witness's) brother: upon this evidence there was a verdict for the plaintiff, the defendant not having examined any witness upon motion to set this verdict aside and for a new trial, upon the ground that it was had against the weight of evidence and by surprise, grounded upon affidavits in which the defendant positively stated that he never accepted these bills or authorised any one to do so, and that he was misled by the belief that, from some observations made by plaintiff's attorney, he intended to rely solely upon a case of authority and not of actual handwriting; *Held*, that this verdict was not against the weight of evidence; but the Court, without admitting the surprise, considering that the evidence of the handwriting was not satisfactory, and also the positive swearing of the defendant, granted the motion for a new trial upon terms. Q. B. *Smith v. Mc'Gonegal* 267
2. Where a party intends to rely upon a case of surprise, for the purpose of disturbing a verdict, he ought to bring the fact of surprise under the consideration of the Judge at the trial, and have a note taken of it. *Semble. Ibid.*
3. Where A. declared for disturbance of a water-course, through which he alleged he had a right to have the water of a certain ancient stream flow, "at all reasonable times," and it appeared that A. was tenant from year to year to B., who had had a user of this and a certain other water-cut from the same stream for more than twenty years, using one at one time, and another at another time, as he pleased, and under whom, until B's interest was evicted in the year 1825, the plaintiff had been so enjoying the benefit of the stream; and subsequent to the eviction the plaintiff continued to hold as tenant from year to year to the head landlord, as he had before held from B. Upon the trial the jury having found a verdict for the plaintiff, on a motion to set that verdict aside, and to have a nonsuit entered, on the ground that the demise of this right should be by deed, and also upon the ground of a variance between the right declared on and proved; *Held*, that the motion should be refused, with costs, the Court being of opinion that the *parol* demise was sufficient, and that there was no variance. Q. B. *Hough v. Kennedy* 182
4. Water alone cannot be demised without deed; but it can be so demised in conjunction with land. *Semble. Ibid.* 185
5. Where a verdict was had for the plaintiff, subject to objections, and the Court were of opinion that one of the questions which the Judge at *Nisi Prius* refused to leave to the jury, ought to to have been left to them, they refused

a new trial on this ground, as it appeared the result would be the same, and non-suited the plaintiff upon the other objection. *Q. B. Lessee of Kennedy v. Hayes* 186

## II. Practice as to.

6. The Court will not allow additional affidavits to be filed by the party who applies for a new trial in answer to affidavits filed to resist that application; but if upon hearing the motion the Court think it necessary, leave will then be granted to do so. *C. P. Administrator of Kelly v. Dolphin* 78
7. Where a cause had been tried by a special jury, and upon a bill of exceptions having been taken a *venire de novo* was awarded, and the defendant brought down the cause by *proviso*; it appeared that upon the latter occasion the *distringas* was in the common form, except that the words "by proviso" were written under the Officer's name, and it was objected at the trial, first, that the *distringas* was informal and irregular; and, secondly, that the special jury which had been struck previous to the former trial was the proper jury to try the case; the Court overruled the objections, and refused to disturb, upon these grounds, a verdict had for the defendant. *Q. B. Bell d. Smith v. Nangle* 296

## NOTICE.

1. The Court will not allow the costs of a motion to set aside proceedings, where the notice of motion does not sufficiently specify the defect upon which the motion is grounded. *L. E. Loveland d. Lynch v. The Casual Ejector* 240
2. Where a statute provided that notice of an appeal should be given to the adverse party "within one week at least" before such appeal was to be heard; *Held*, that notice given on the 22d for the 29th of the same month was insufficient. *Q. B. Regina v. Sweeny* 278

## NOTICE TO QUIT.

*See EJECTMENT*, 1, 2, 3.

## ORDER.

The conditional order requiring tenants to enter into the terms prescribed by the 1 *G. 4*, c. 87, before taking defence to an ejectment under that statute, ought

to state that the deeds under which the tenants held were produced in Court when the order was obtained. *Q. B. Lessee of Orpen v. The Casual Ejector* 291

## OYER.

In an action against a clerk of a joint stock banking company, upon his bond to the trustees of the company, for the faithful discharge of his duties, the Court refused to compel *oyer* of the deed of settlement of the company which was recited in the bond. *C. P. Stanhope and others v. Quill* 68

## PAROL DEMISE.

*See NEW TRIAL*, 3, 4.

## PARTICULARS.

*See BILL OF PARTICULARS*.

## PARTNER.

In order to substitute service of process upon a partner resident out of the jurisdiction, by serving a partner resident within it, it is necessary that the affidavit should state that the cause of action is a partnership demand. *Q. B. M'Kenny v. Mark* 161

## PEREMPTORY UNDERTAKING.

*See JUDGMENT*, 21.

## PERJURY.

*See SERVICE*, 6, 7.

## PLEADING.

*See AMENDMENT*.

## DECLARATION.

## DEMURRER.

## REJOINDER.

1. Where in replevin the plaintiff declared for a taking on the 9th of August 1838, and the defendant avowed for five years' arrears of rent next before and ending on the 25th of March 1836, due to the defendant by virtue of a demise theretofore made, and the plaintiff pleaded, amongst other pleas, a plea of the recent statute of limitations (3 & 4 *W. 4*, c. 27, s. 42), to the whole amount of the arrears; the defendant demurred principally on the ground, that the plea of the statute should have been confined to the period of the five years which were outside

- six years, but the Court overruled the demurrer. Q. B. *Wilson in replevin v. Jackson* 1
2. Although the terms of the contract must be accurately stated in an avowry, and a variance in respect to them would be bad, yet the time stated is not material. *Per BURTON, J. Ibid.* 6
3. Where a further plea to an avowry in the formal part (as to leave of the Court, &c.) professed to be an answer to the whole of the avowry, but in the substantial part of the plea professed to be an answer and only answered as to a part of the demand; *Held* good on general demurrer. C. P. *Ryan v. Young* 76
4. *Semle*—That this plea would be bad on special demurrer. *Ibid.*
5. The privilege of suing in the name of any one of the public officers given by the 6 G. 4, c. 42, to banking companies established pursuant to that act, does not authorise the institution of a suit in the names of two or more public officers; therefore, a demurrer on this ground was allowed. L. E. *Thompson v. Birnie* 234
6. Where to an avowry the defendant pleaded that the property in question was the joint property of himself and the plaintiff; *Held*, that this was a good plea; and where to the avowry several other pleas were pleaded, in all of which the taking was denied, and the detention justified; *Held*, that the said pleas were bad for duplicity. Q. B. *Reeves v. Morris* 309
7. Where an agreement was stated in the declaration, and that the "said plaintiffs (two) and defendant did thereby "bind themselves in a penalty of £200, "that they would continue their establishment for one year from the date;" and the breaches assigned were, that "the defendant did not and would not "continue the aforesaid establishments, "nor co-operate with the plaintiffs in "continuing the said establishments for "the said period of one year;" *Held*, that the declaration was bad on special demurrer for uncertainty. Q. B. *Cummins and Newberry v. Kenny* 347
8. In an action of covenant for rent due, the defendant pleaded a surrender of

- the premises, and that the plaintiff accepted the same, to which the plaintiff replied, that the defendant *did not surrender* and that he (the plaintiff) *did not accept* the same, to which the defendant demurred for duplicity; *Held*, that the surrender and the acceptance constitute but one entire matter of defence, and that therefore the replication is good. Q. B. *Purdon v. Dickson* 351
9. It is true, as a general proposition, that the rules of pleading require that issue should be taken on one point, and that the replication should consist of a single proposition; but to the latter part of this proposition there is an admitted exception, and that is where the plea consists of matter in excuse. *Per BURTON, J. Ibid* 356

## POWER.

Where a lease of three lives renewable for ever was put in settlement, and a power to the successive tenants for life to "demise or lease for any term or number of lives or years consistent with "their respective interests therein, to "commence in possession and not in reversion;" *Held*, that a lease for three lives other than those in the head lease, with a covenant for perpetual renewal, was a valid execution of the power. C. P. *Smith v. Clarke* 78, 205

## POWER OF ATTORNEY.

*See* LODGING AND DRAWING OUT MONEY.

## PRACTICE.

*See* the respective Titles.

## PRESENTMENT.

*See* GRAND JURY, 4.

## PRINCIPAL AND AGENT.

Where certain suits were pending, in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others, he reported B. a creditor by a judgment affecting them for a certain sum; *Held*, that this was not such an acknowledgment in writing by the agent of A. to B. or to his agent, as would take the case out of the statute of limi-

## PRINCIPAL.

tations. *Q.B. Hill, Assignee of D'Courtney, v. Stawell* 302

### PRISONER.

*See ARREST.*

### PRIVILEGE FROM ARREST.

*See ARREST.*

### PROCESS.

*See APPEARANCE.  
SERVICE.*

### PROSECUTION FOR PERJURY.

*See SERVICE, 6, 7.*

### PUBLIC COMPANY.

*See PLEADING, 5.  
OYER.*

### PUBLIC OFFICERS.

*See PLEADING, 5.*

### PUBLICAN.

*See SPIRIT LICENSE.*

### QUO WARRANTO.

Where S. and D. were candidates for the office of treasurer of the public monies of the city of Dublin, in 1836, and the former was elected, the Returning Officer (the Lord Mayor) having rejected the votes of some of the Divisional Justices of the city who attended and tendered them for D; and D. subsequently filed an information in the nature of a *quo warranto*, and obtained a verdict that S. was not duly elected; to which exceptions were taken, and afterwards overruled, the Court holding that these Justices had a right to vote at this election. D. then applied for a *mandamus* to the Lord Mayor to convene a meeting to complete his (D.'s) election, and at the same time applied for a *mandamus* to the Lord Mayor to hold a new election, on the ground that the former was void, and the Court granted the former and refused the latter application. To this *mandamus* the Lord Mayor made a return, setting out that the Divisional Justices were not duly summoned, &c. to shew that the election was void; and while the question thereby raised was pending, he held another election, at

## RELATOR.

21

which S. was the only candidate, and was elected. D. then obtained an order to quash the return, and for a peremptory *mandamus* to the Lord Mayor, by virtue of which he was put into possession of the office. The present relator now applied for a *quo warranto* against D., upon the ground that the election of 1836 was void, the Divisional Justices not having been duly summoned, and although it was insisted, amongst other things, that this was really S.'s application, who had hitherto insisted upon the validity of that election, and who had two or three opportunities on which he might have raised the same questions he now sought to raise, and either omitted to do so or failed upon them. The Court made the rule for the *quo warranto* absolute. *Q. B. The Queen, at rel. of Kinahan, v. Darley* 253

### REGISTRY OF ELECTORS.

1. On an application to register anew under the 27th section of the 2 & 3 W. 4, c. 88; *Held*, that a certificate of former registry was valid, although it omitted to state the voter's addition, or the county in which he resided. *L. E. In re Reilly* 245
2. A beneficial interest of £10 per annum remaining after a due apportionment of the rent upon that part of the premises out of which a leaseholder seeks to register his vote: *Held* to be a sufficient qualification under the 2 & 3 W. 4, c. 88, although such interest be not over and above the entire rent to which the premises are legally liable. *L. E. In re M'Kee* 249
3. The power of adjournment conferred upon the Lord Lieutenant by the 33d section of the 2 & 3 W. 4, c. 88, applies to all future Registry Sessions, as well as to the first Special Sessions held under the act. *Ibid.*

### REJOINDER.

Under peculiar circumstances, this Court will enlarge the time to rejoin, although notice of the application has not been given. *C. P. Dickson v. Gerty* 209

### RELATOR.

*See QUO WARRANTO.*

## RENEWAL.

See POWERS.

## RENT.

1. Are arrears of rent reserved by indenture within the 42d section of the 3 & 4 W. 4. c. 27? *Quære. C. P. Armstrong v. Lloyd* 70
2. Conventional rents are. *Wilson, in Replevin, v. Jackson* 1

## REPLEVIN.

See PLEADING, 1, 2, 3, 4, 6.

## RESTITUTION, WRIT OF.

See EJECTMENT, 12, 13.

## RETURN TO ELEGIT.

See ELEGIT.

## RULES OF COURT.

2. Parties cannot by consent vary a rule of Court, without making such consent a rule of Court. *Q. B. Lessee of Dawson v. Bell* 279

## SCIRE FACIAS.

See JUDGMENT, 10, 11, 12, 13, 14.

## SECURITY FOR COSTS.

See COSTS, 6.

EJECTMENT, 5.

## SENTENCE

See CRIMINAL LAW, 1, 2.

## SERVICE.

See AFFIDAVIT, 5, 6.

## 1. Substitution of.

In order to substitute service of process upon a partner resident out of the jurisdiction, by serving a partner within it, it is necessary that the affidavit should state that the cause of action is a partnership demand.

The following statement was held sufficient:—"The action is brought against the defendants, as partners in trade, for goods sold and delivered." *Q. B. McKenny v. Mark* 161

2. A writ of *ca. ad resp.* was forwarded to defendant's land agent, with a request to forward the same to the defendant, who, it was supposed, was out of the country. Subsequently a notice was served upon plaintiff's attorney by O'S., cautioning him from proceeding further

in the cause, as the defendant was in the country, and at large, when the writ was forwarded to his agent, and the notice was signed by O'S. as "attorney for the defendant," the Court allowed the service to be deemed good service. *Q. B. Anonymous* 161

3. Where it was sought to revive a judgment against the heir and terretenants of the consor, and the heir was resident in England, service upon him was substituted, by serving the guardian of his fortune, who resided in this country, and the guardian of his person, with whom he resided in England. *Q. B. Bond v. Bond* 163

4. Service of a writ upon the defendant's servant deemed good service of the defendant, giving him notice thereof by a letter through the post-office inclosing a copy of the writ, after it was out of return. *C. P. Knipe v. O'Reilly* 199

5. The Court refused to allow the service of a writ on the agent, resident in Ireland, of a party who was residing in France to be deemed good service of the latter. If a sufficient attempt be unsuccessfully made the Court will assist. *C. P. Gillespie v. Cumming* 200

## 11. Regularity of.

6. If it appear probable to the Court that the defendant was not served with process, the Court will, on the affidavit of the defendant, that he is ready to prosecute the process-server for perjury, order his affidavit to be taken off the file for that purpose, and allow the costs of the proceedings to abide the event. *C. P. Comerford v. Burke* 85

7. Where a defendant applied to set aside proceedings on an affidavit that he had not been served with process, and he was ordered to prosecute the process-server, and upon the trial the jury disagreed although there was strong evidence of the process-server's guilt, the Court afterwards made the conditional order absolute with costs, although the defendant would be thereby enabled to plead the statute of limitations to any future action for the same demand. *C. P. Comerford v. Burke* 197.

## SET-OFF.

See BILL OF PARTICULARS.

## SHERIFF.

### SHERIFF.

See STAYING PROCEEDINGS, 2.

1. Where a person is in custody of the sheriff upon a criminal charge, it is not necessary to obtain an order of the Court for the sheriff to detain him in a civil suit. *L. E. Buckmasters v. Cox* 101
2. Where a sum of money is lodged in Court by a sheriff until the conflicting claims of two parties are decided, the party found entitled may, when inconvenient to himself attend, obtain an order for his attorney duly authorised to accept the transfer. *Q. B. Desmond v. Desmond* 160
3. Where the sheriffs of the City of D. levied a certain sum under an execution and before they paid it over to the plaintiff received two notices from creditors of the defendant, stating that the defendant was a bankrupt, and cautioning them against paying the said sum to the plaintiff; and it appeared that the sheriffs had delayed the execution of the writ and the sale of defendant's goods, and from the circumstances of the case the Court were of opinion that they did not act *bona fide* in the transaction, a motion on their behalf to lodge the sum in Court until the adverse claims were decided was refused with costs. *Q. B. Ramsden v. Conry* 175
4. The affidavit on the part of the bail must deny collusion with the original defendant. *Q. B. Smith v. Callan* 180
5. Where a sheriff, against whom an order for a fine had been obtained for not returning a writ of *habere facias possessionem*, under which possession had been given, applied for a duplicate writ and stated in his affidavit that the original had been lost, and could not be found since the execution of it, his motion was granted upon payment of all costs. *Q. B. Lessee of Donnelly v. Malone* 262

### SOLDIER.

See ARREST, 2.

### SOLITARY CONFINEMENT.

See CRIMINAL LAW, 2.

### SPECIAL JURY.

See COSTS, 9, 10.

JURY, COMMON & SPECIAL, 2, 4.

## TAXATION. 23

### SPIRIT LICENSE.

A person who is already a licensed publican is not entitled to a grocer's license since the passing of the 6 & 7 W. 4, c. 38. *Q. B. Regina v. Commissioners of Excise* 287

### STAMP.

See AFFIDAVIT, 7.

EJECTMENT, 1.

### STAYING PROCEEDINGS.

1. The Court will permit the defendant to enter a rule to stay proceedings until the costs of not going to trial, pursuant to notice, be paid, where a trial has been lost by the default of the plaintiff in not delivering the *distringas* to the sheriff in sufficient time to enable him to summon the jurors six days before the Assizes. *L. E. Gillespie v. Cumming* 28
2. On a motion to stay proceedings in action against the bail, on the ground of considerable delay in the plaintiff's proceedings, and that the principal had in the meantime become insolvent, the Courts require that the affidavit by the bail shall deny collusion with the original defendant. *Q. B. Smith v. Callan* 180

### SUBMISSION.

See ARBITRATION.

### SURPRISE.

See NEW TRIAL, 1.

### SURRENDER.

See PLEADING, 8.

### TAKING OFF THE FILE.

See BAIL, 1.

If it appear probable to the Court that the defendant was not served with process, the Court will, on the affidavit of the defendant that he is ready to prosecute the process-server for perjury, order his affidavit to be taken off the file for that purpose, and allow the costs of the proceedings to abide the event. *C. P. Comerford v. Burke* 85, and *See S. C.* 197

### TAXATION OF COSTS.

See COSTS, 7, 8.

## TENANT FROM YEAR TO YEAR.

See EJECTMENT, 1, 2, 3.

## TIME.

1. Where a statute provided that notice of an appeal should be given to the adverse party at least "within one week" before such appeal was to be heard; *Held*, that notice given on the 22d for the 29th of the same month was insufficient. Q. B. *Regina v. Sweeney* 278

## TITHES.

1. The presumption of a defendant's liability to tithe composition arising from his possession of the lands, is not rebutted by the statement of the plaintiff's witness, the land agent of the defendant, that there had been an outstanding lease, and that the defendant had entered into the possession of the land upon a *parol* surrender, without any instrument in writing; the defendant in such circumstances not falling within either of the exceptions contained in the 12th section of the 2 & 3 W. 4, c. 119, being neither tenant from year to year, nor at will, within the meaning of the act. L. E. *Lord Shannon v. Stoughton* 215
2. The 3 & 4 W. 4, c. 27, s. 2, does not apply to claims for tithe composition as between the tithe claimant and the owner of the land, but only to *estates* in tithe. *Semble*. L. E. *Lord Shannon v. Hodder* 223 note

## TREASURER OF THE PUBLIC MONIES OF THE CITY OF DUBLIN.

See QUO WARRANTO.

## TRIAL BY PROVISIO.

See NEW TRIAL, 7.

## TRESPASS.

1. In an action of trespass for *mesne* profits, in which the general issue only is pleaded, the judgment in ejectment is conclusive evidence of the plaintiff's title, whether that judgment has been obtained on verdict or by default. L. E. *Lessee of Armstrong v. Norton* 96

2. Where an action of trespass for *mesne* profits is brought against a party who has let judgment in the ejectment go by default, an attested or examined copy of the affidavit of the service of the ejectment is sufficient evidence of the fact of such service in the action for *mesne* profits. *Ibid*.

## TRUSTEES.

See JUDGMENT.

Where new trustees had been appointed by an order of the Court of Chancery, made upon petition under the 1 W. 4, c. 60, and a person appointed to assign the trust securities (consisting of judgments) so as to vest the same in such new trustees upon the trusts in the petition mentioned—the Court of Exchequer, on motion, directed its Officer to enter the assignment of the said judgments on the roll thereof, and in the entry of such assignment to recite so much of the order of the Court of Chancery as had been set out in the memorial of the assignment. L. E. *Armit, Assignee of Armit and Borough, v. Viscount Ferrard* 372

See, also, *Burrowes v. Hogan* 369

## VARIANCE.

See NEW TRIAL, 3.

## VENUE.

1. A motion to change the venue on the usual affidavit, is too late after plea pleaded. L. E. *Mulvany v. White* 33
2. In transitory actions, an attorney has the privilege of suing in his own Court, and laying and retaining the venue in the county it is situated. An application to change the venue on the usual affidavit was refused upon that ground. Q. B. *Montgomery v. Cheyne* 163
3. The common affidavit to change the venue is informal, in not stating in express terms that the cause of action did not arise in the county in which the venue is laid; and also in introducing any thing beyond the usual form as to the place where the cause of action arose. Q. B. *Anonymous* 286
4. Where the venue has been changed on the usual affidavit, and it appears incontrovertibly, that the allegation in the affi-

- davit was untrue, the Court will bring back the venue. Q. B. *Nichol and Morris v. Hickson* 328
5. The venue will not be changed on the ground that the plaintiff is a county surveyor, and is on that account possessed of influence with the jurors. Q. B. *Hall v. McKenna* 359
6. In an action by an attorney for the recovery of a bill of costs, the venue was changed, before plea pleaded, to the adjoining county from the county of the city of L., in which the venue was laid, upon an affidavit that a fair and impartial trial could not be had there. L. E. *Boyse v. Smyth* 366
7. The venue in an action on a policy of insurance changed from the county of a city to the adjoining county, upon an affidavit stating that an impartial trial could not be had in the former. Slight grounds are sufficient to change the venue from the county of a city to the adjoining county. L. E. *Scanlan and Wife, Administratrix of Fitzmaurice v. Scales and others* 368

WATER COURSE.

See NEW TRIAL

WARRANT OF ATTORNEY.

See BOND, 1, 2.

WILL.

See ESTATE.

- R., assignee of a lease for three lives, devised the lands to trustees in trust for his wife for life, remainders over for the whole of his interest: *Held*, that the wife was assignee of the testator's entire interest for her life. L. E. *Maunsell v. Russell* 205, *note*.

WITNESS.

1. A witness to a deed of submission to arbitration refused to verify said deed by affidavit; upon motion for an attachment against him, the deed was made an order of Court without such affidavit. C. P. *Shortall v. Moran* 87
2. A party will not be allowed lump sums for the expenses of witnesses. Q. B. *Atkinson v. Carty* 170

WRIT.

*Of Restitution.*

See EJECTMENT.

*Of Scire Facias*

See JUDGMENT, 10, 11, 12, 13, 14.

1. Where a defendant was arrested under a writ of *capias quo minus*, in which he was described by the initials of one of his Christian-names, he was discharged, on entering a common appearance, although he had signed the promisory note on which he was sued by the same initial, it appearing that due diligence had not been used by the plaintiff to obtain a knowledge of the defendant's proper name. L. E. *Hynes v. Batt* 23
2. The Court of Common Pleas will now, in conformity with the practice in the other Law Courts, allow a new writ of *ca. sa.* to issue where a year has not elapsed since the *return* of the former writ, although it be more than a year since the latter *issued*. C. P. *Leycester v. Sweeney* 197
3. A sheriff will obtain a duplicate of a writ which after execution was lost, before it was returned, upon paying all costs. Q. B. *Lessee of Donnelly v. Malone* 262











